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———————— **qualifications of**—*Appoint, power to—Local Government*—Ss. 29, 30 *of 21 and 22 Vic. Ch. 106.*

Whenever the office of the Advocate-General of any province falls vacant, the Local Government of that province has power to make a temporary appointment to that office. In the making of such appointment the Government is not under any restriction to limit its choice to the class of barristers. The Local Government may appoint a vakil to the office.

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1. **Alienation**—*Guardian and ward—Guardian's powers of alienation of ward's property.*

The power of a guardian to alienate his ward's property is not co-extensive with that of a trustee; the former is more limited than the latter. A guardian can alienate only in cases of necessity or for an evident advantage to his ward.

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The guardians of a minor advanced a sum of money belonging to his ward on the security of certain lands. Subsequently, at the request of the mortgagor, the guardians released a portion of the secured lands from liability under the mortgage, on the ground that the remainder of the property was ample security for the loan. Subsequently, the mortgagor mortgaged the portion so released to a third person who took the mortgage with knowledge of the previous mortgage and the release.

The minor coming of age sued the mortgagor and the subsequent mortgagee for the enforcement of the debt due to him against all the property originally mortgaged:

Held, that he had a right to realize his debt from all the property originally mortgaged.

2. ———— :—*See* GUARDIAN AND WARD (1).

————, **restriction Against** :—*See* WILL, CONSTRUCTION OF.

Appeal in forma pauperis :—*See* LIMITATION (2).

'Association' meaning of :—*See* INDIAN COMPANIES ACT.

Attachment :—*See* VESTING ORDER.

Award :—*See* CIVIL PROCEDURE CODE (15).

Bandhus, Exparte paterna :—*See* HINDU LAW (3).

Benami decree holder :—*See* CIVIL PROCEDURE CODE (7).

————, **Proof of** :—*See* REVENUE RECOVERY ACT (1).

Benamidar, suit by :—*See* NEGOTIABLE INSTRUMENTS ACT (3).

Benami purchase by Government servant—*Government servant, purchase of property by, in contravention of departmental rule—Declaration, Government servant is entitled to.*

The acquisition of property by a Government servant in the name of another in direct contravention of departmental rules, is not illegal; such Government servant if he is in possession of the property so acquired is entitled to maintain a suit for declaration of his title as against the person in whose name it was acquired, and if not in possession, is entitled to maintain a suit for possession.

Manual S. Lobo v. *Nicholos Britto* 268

Charge Sheet :—*See* CRIMINAL PROCEDURE CODE (2).

Chit Funds :—*See* KURIES; ALSO INDIAN COMPANY'S ACT.

1. Civil Procedure Code, S. 11 :—*Office—Dignities attached to an office in a temple—Dignities and emoluments inseparable—Suit for an office.*

The plaintiff as purchaser of certain dignities and emoluments appertaining to the office of Malji Dharmakarta Miras in the Conjeevaram Devaraja Swamidevastanam, sued the trustees of the temple, for a declaration of his right to the incomes and *Swatantrams* appertaining to the miras and for the recovery of arrears of such incomes and *Swatantrams* unlawfully withheld from him by order of the defendants. Most of the items claimed by the plaintiff were really income possessing a money value, but some of them savoured of mere dignities. But it appeared that these dignities had always been sold and mortgaged by the office-holders for the time being along with the incomes, and that such sales and mortgages had been recognised and enforced by civil courts, and that such dignities had always been treated as part and parcel of the office and inseparable from the incomes attached thereto.

Held :—That the plaintiff was entitled to the declaration sought for and for the recovery of the arrears claimed.

Krishnaswami Thatha Chariar v. *Appanaiyangar.*

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2. ——————, **Ss. 13 and 14**:—*Res judicata—Cause of action—Titles different.*

Plaintiff first sued the defendants in ejectment as adopted son of last owner. The suit was dismissed. He now sued the same individuals for the same relief as devisee under a will of the deceased.

Held: that the present suit was not barred either under S. 13 or S. 43 of the Civil Procedure Code by reason of the former suit and the decision therein.

Kameswar Pershad v. *Rajkumari Ruttun Koer* L. R., 19 I. A., 234 distinguished.

Subrahmanian Chetti v. *Authinarayanan* 288

2. A. —————— **S. 30**:—*See* Religious and Charitable Endowments (3).

3. —————— **S. 43**:—*See* Revenue Recovery Act (2).

4. —————— *Description of parties to suit.*

A plaint was presented in a court without mentioning the ages of the defendants to the suit and without giving the father's name of one of the defendants. The Court returned it for amendment in these particulars and for re-presentation within a particular time. As this was not done the Court rejected the plaint.

Held, that the order of the Court was reasonable and within its discretion.

Somayajulu v. *Surayya*. 81

5. —————— **Ss. 54, cl. (6), 562 (A)**:—*Court fees Act, VII of 1870, Ss. 6 and 28—Limitation Act, XV of 1877, S. 4—Plaint insufficiently stamped—Presentation and filing—Power of Court to grant time.*

Under cl. (*b*) of S. 54 of the Code of Civil Procedure, a Court in returning a plaint to be properly stamped has no power to fix such a period for payment of deficient fee as would run beyond the last day allowed by the law of limitation for the institution of the suit.

A plaint was presented upon an insufficiently stamped paper on the last day allowed by the law of limitation, and subsequently within the time fixed by the Court was re-presented with a proper stamp. But on the day on which it was re-presented the suit was barred.

Held: that the suit was instituted only when the proper court fee was affixed, and that as at that moment time had run, the suit was barred.

Jainti Prasad v. *Bachu Sing*, 15 A 65, followed.

Stuart Skinner v. *William Orde*, 2 A. 247, distinguished.

Venkatramayya and others v. *Kristnayya* 257

6. —————— **Ss. 228, 244, 257 (*a*), 278**—*Representatives to parties to suit—Mortgagee of attached property—Claim by mortgagee to property attached—Judgment-debt, agreement in satisfaction of—Court executing decree, sanction of.*

A Court to which a decree has been transmitted for execution has no power to sanction an agreement of the nature contemplated by S. 257 (*a*), Civil Procedure Code. That power can be exercised only by the Court that actually passed the decree.

The word "representatives" in S. 244, Civil Procedure Code, ought to be construed literally and it includes the mortgagee of property mortgaged subsequent to its attachment in execution of a decree.

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In execution of a decree for money, A. attached certain properties of his judgment-debtor; subsequent to the attachment and before sale the judgment-debtor mortgaged the properties attached to B. who took possession under his mortgage. B then put in a claim petition under S. 278 and objected to the sale alleging that the decree had been satisfied. On B's objection, the District Judge found that the decree had been satisfied, and accordingly dismissed the execution petition.

Held, that B was a 'representative' of the judgment-debtor within the meaning of S. 244, and

that an appeal lay under S. 244 against the order of the District Judge.

Paramananda Doss Ananda Doss v. *Mahabar Dossji* 89

7. ————————, **S. 232**—*Benami decree-holder—Real owner entitled to declaration—Suit on bond by benamidar—Agent, decree in the name of, principal is entitled to the benefit of—Specific Relief Act* S. 56 *cl.* (*b*).

Where a benamidar sues on a bond and gets a decree in his own name the real owner of the bond can sue for a declaration that he is entitled to the benefit of the decree and execute the same. Similarly a principal is entitled to sue for a declaration in respect of a decree obtained by his agent in his own name. But they cannot sue for an injunction restraining the decree-holder from excuting his decree and realizing the amount due under it.

After getting such a declartion the real owner has a right to apply under S. 232 of the Civil Procedure Code to have his name put on the record and execute the decree

Sethurayer v. *Shunmugam Pillai* 279

8. ————————, **Ss. 233, 246**—*Transferee of decree.*

The assignee of a decree, which subsequent to the assignment is appealed against and confirmed by the appellate Court without his (the assignee's) name being brought on the record, is an assignee within the meaning of S. 246, Civil Procedure Code, and a satisfaction entered on the decree under the provisions of that section is binding on him though made subsequent to the assignment to him and before his name is brought on the record.

Ramakrishna Aiyar v. *Narayana Aiyar* 227

9. ————————, **Ss. 241 258,**—*Adjustment after decree in execution proceedings—Adjustment not certified—Separate suit for damages for breach of agreement.*

A decree-holder applied for execution of his decree and the judgment-debtor pleaded that the parties had come to some adjustment; the Court gave the parties a week's time to compromise. At the end of the week the Court allowed execution to proceed as it thought that the parties would not compromise. No application was made under S. 258 to certify any adjustment and the Court had no occasion to decide whether the parties had or had not come to any particular agreement. The present suit was brought by the judgment-debtor for recovery of properties given him under an alleged compromise made by the parties before the passing of the above mentioned order in execution and for damages.

Held: That the suit with respect to the recovery of properties of which the defendant had taken possession in execution of the previous decree was *res judicata*;

and that the plaintiff's suit for damages for breach of the alleged agreement was barred by S. 244.

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Subbakka v. *Viraraghava Reddi*, I. L. R., 5. M., 397 and *Mallamma* v. *Venkappa*, I. L. R., 8 M., 277 followed. *Guruvayya* v. *Vudayappa*, I. L. R., 18 M., 26 distinguished.

Krishnaswami Aiyangar v. *Runga Aiyangar* 71

10. ———————, **S. 295**—*Decree for money—Rateable distribution—Mortgage Decree, nature of—Right of mortgagee decree-holder to proceed personally against judgment-debtor in the first instance.*

Every decree by virtue of which money is payable to the decree-holder is to that extent a "decree for money" within the meaning of S. 295 of the Civil Procedure Code.

A mortgagee who obtains a decree on his mortgage to the effect "that the defendant do pay plaintiff within two months from this date, Rs. 2,500, and that, in default, plaintiff do recover the same by sale of the mortgaged property, and the balance, if any, from the defendant" is a holder of a money decree and is entitled to come in for rateable distribution under S. 295 before first realizing as much, as he can, of his decree-amount by sale of the mortgaged property.

Harat v. *Tara Prasanna Mukerji*, I. L. R., 11 C., 718, followed.

Ram Charan Bhagat v. *Sheobarat Rai*, I. L. R., 16 A., 418, dissented from.

Kommachi Kather v. *Pakker* 66

11. ———————, **S. 295**—*Rateable distribution—Refund of assets, suit for, allowed only after payment to the wrong person—Declaration, suit for, not allowed.*

The right to claim a refund of assets given by the last para of S. 295, Civil Procedure Code, arises only after such assets have been actually paid to a person not entitled to receive the same.

A suit by a decree-holder for a declaration that another decree-holder is not entitled to a rateable distribution of the assets realized by sale of the judgment-debtor's property at his (plaintiff's) instance is not maintainable.

Hart v. *Tara Prasanna Mukherjee*, I. L. R., 11 C., 718 followed.

Parasurama Pattar v. *Veeraraghava Pattar* 277

12. ———————, **S. 317**—*See* Hindu Law (6).

13. ———————, **S. 317**—*Certified Purchaser—Benami for family—Assignee from certified purchaser not entitled to the protection of S. 317.*

The protection given by S. 317, Civil Procedure Code, must be limited to the certified purchaser alone and cannot be extended to his assignees.

Theyya Velan v. *Kochan* 290

14. ———————, **S. 335**—*Indian Limitation Act, sch. II, Art. 11—Order rejecting application after enquiry.*

Where on an application under S. 335, Civil Procedure Code, by an auction purchaser to direct the removal of obstruction by a third party, to his taking delivery of the property purchased, a court after considering the documentary evidence produced before it and hearing the arguments of both sides rejects the petition and refers the petitioner to a regular suit, on the ground that the matter was one which ought properly to be tried in a regular suit.

Held:—That the order was properly passed under S. 335, Civil Procedure Code, and was, therefore, governed by Art. 11 of Sch. II of the Limitation Act.

Kamalattanni v. *Renga Aiyangar* 310

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15. ———————, **Ss. 520, 521, 522 and 525**—*Arbitration—Private award—Award ante-dated—Misconduct of arbitrator.*

Where an application is made to a court under S. 525, Civil Procedure Code, to file a private award, the court filing the award has jurisdiction to inquire into the genuineness of the award; and where an objection is raised to the filing on the ground that the award was made after a notice of revocation of the submission had been served on the arbitrators and was perversly ante-dated by them, the court has power to go into the matter and decide it finally. If such an objection is considered and disallowed and a decree passed in accordance with the award, no subsequent suit will lie in which the same matter can be re-agitated.

Micharaya v. *Sadasiva Parama*, I. L. R., 4 M., 319, and *Amrit Ram* v. *Dasrat Ram*, I. L. R., 17 A., 21, followed.

Chinta mallayya v. *Thadi Gangireddi* 61

16. ———————**S. 574**—*Judgment of appellate court—Reasons for decision to be stated.*

Where an appellate court sends down an issue to the court of the first instance for a revised finding on it after taking further evidence and the lower court returns the revised finding, the appellate court, is in the absence of any admission by the party against whom the issue has been found, bound to form its own opinion on the evidence and record its finding with reasons for it, even though no objections may have been raised against the finding by the party himself.

But, if under such circumstances, the appellate court simply accepts the finding without even saying whether it concurs in it or not, then its judgment on it is not a judgment as required by S. 574 of the Civil Procedure Code.

Bhagvan v. *Kesur Kuverji*, I. L. R., 17 B., 428, *Ramachandra Govind* v. *Sono Sadashiv*, *Ib.* 19 B., 551 followed.

Musaliyam Kunhi v. *Valiyakath Periyattail* 236

17. ———————**S. 622**:—*See* PRESIDENCY SMALL CAUSE COURTS ACT.

Commission to executor:—*See* MAHOMEDAN LAW.

Company:—*See* TRANSFER OF PROPERTY ACT (7).

Compensation for improvement by tenant:—*See* MALABAR TENANTS IMPROVEMENTS ACT.

Consideration, extension of time of Performance sufficient—*Agency revoked—Payment to agent after revocation and without notice, validity of.*

A payment by a debtor to the agent of his creditor after the agent's authority had been terminated is valid as against the creditor, provided the debtor had no notice of the termination of the agency when he paid the debt.

N was one of the joint owners of a *srotriam* village, of which the defendants were tenants. N, was also for some time agent of the other *srotriamdars* to manage the affairs of the village. Subsequently, however, the other *srotriamdars* withdrew their authority from N, but this fact was not made known to the defendants. The defendants fell into arrears in the payment of rent for a period subsequent to the termination of N's agency and for such arrears they executed debt bonds in the name of N. The pliantiff was the assignee of such bonds. In a suit by the plaintiff on these bonds;

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Held, that the bonds were not void for want of consideration and that the defendants were bound to pay the amounts due under the bonds and were protected from a second demand on the part of the other *srotriemdars* by S. 208 of the Indian. Contract Act.

Narasinga Pillai v. *Muthusami Naickar* 218

Contract, Rescission of:—*See* LIEN FOR ADVANCE MONEY.

———**to sell by Father**:—*See* HINDU LAW (2).

Costs of defending mortgagor's title:—*See* TRANSFER OF PROPERTY ACT (4).

1. **Court Fees Act, VII of 1870**—*Valuation of suit—Jurisdiction. Suit for land after demolition of buildings.*

In a suit by the plaintiff for the recovery of certain land after removing the buildings illegally erected thereon by the defendant, the value of the land alone is to be taken into consideration in estimating the value of the subject-matter of the suit and not the value of the buildings sought to be removed.

Ramasami v. *Gundappa.* 49

2. ————————, **Ss. 6, 28**:—*See* CIVIL PROCEDURE CODE (5).

3. ————————, § 7, *cl.* 4 *(b)—Suits- Valuation Act, VII of* 1887 § 8—*Madras Civil Courts Act III of* 1873, § 12—*Suit by a Hindu co-parcener for partition and delivery of his share of family property—Jurisdiction—Subject-matter of suit.*

The plaintiff, a member of a joint undivided Hindu family governed by the Mitakshara law, sued for partition and delivery of his share of the joint family property. The value of the share claimed by him was below Rs. 2,500 but the value of the entire family property exceeded Rs. 4,000.

Held.—That the Court of the District Munsif of the place where the properties were situated, had jurisdiction to entertain and dispose of the suit.

And that § 8 of the Suits Valuation Act, VII of 1887, had altered the law as laid down in *Vydianatha* v. *Subrahmanya*, (I. L. R., 8 M., 235).

Kumaravelu Goundan v. *Velu Goundan* and *Velu Goundan* v. *Kumaravelu Goundan* 29

Covenants, express and implied:—*See* TRANSFER OF PROPERTY ACT (6).

Cremation:—*See* INDIAN PENAL CODE (1).

1. **Criminal Procedure Code, Ss. 143, 417**:—*See* INDIAN PENAL CODE (1).

2. ————————, **Ss. 157, 168, 173**—*Charge sheet—Police occurrence reports, right of the accused to get copies of—Public documents—Indian Evidence Act Ss. 74, 78.*

(Per. Chief Justice Shephard J, and Benson, J.:—Subrahmania Aiyar, J. dissentiente).

An accused person has no right before the commencement of his trial either to inspect or to obtain copies of (1) the occurrence report made under S. 157 of the Criminal Procedure Code, and (2) the report made under S. 168 of the Criminal Procedure Code by a subordinate police officer to the officer in charge of a police station. These reports are not public documents not being "acts or records of acts" of public officers within the meaning of S. 74 of the Indian Evidence Act,

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Per. Chief Justice and *Benson J.*—

An accused person has no right before the commencement of his trial either to inspect or to obtain copies of the charge sheet drawn up under S. 173, Criminal Procedure Code. The charge sheet is not a public document within the meaning of S. 74 of the Indian Evidence Act.

Per. Shephard J. and *Subrahmania Aiyar J.*—

An accused person has a right before the commencement of his trial to inspect and obtain copies of the charge sheet drawn up under S. 173 of the Criminal Procedure Code. Such a charge sheet is a public document within the meaning of S. 74 of the Indian Evidence Act.

Per. Shephard J.:—The word 'acts' in S. 74 of the Indian Evidence Act means final and completed acts as distinguished from acts of a preparatory or tentative character like the inquiries which a public officer may make under the Criminal Procedure Code or otherwise, and which may or may not result in action.

Per. Subrahmania Aiyar J.—

An accused person is entitled before the commencement of his trial to inspect and to obtain copies of not only the charge sheet framed under S. 173, Criminal Procedure Code, but also of the two reports referred to in Ss. 157 and 168, Criminal Procedure Code.

Arumugam v. Karuppayi 167

3. ————————, **S. 195.**—*Sanction to prosecute—Jurisdiction to give sanction (Act X of 1882)—Enquiry by court prior to giving sanction.*

On an application for sanction to prosecute, under S. 195 of the Criminal Procedure Code, it is competent to the court to which the application is made, to go beyond the record, to hold an enquiry and take fresh evidence for the purpose of determining whether or not sanction should be granted, even though the record itself discloses no foundation for the charges alleged.

Motha v. Moral Motha, ... 311

4. ————————, **S. 488.**—*Adultery—Indian Penal Code, S. 497.*

Adultery on the part of the husband, not being such adultery as would justify a conviction under the Indian Penal Code, may nevertheless constitute sufficient cause for the wife living separately from her husband, and enable her to claim maintenance under the Criminal Procedure Code. But in determining whether the cause shown by the wife for refusing to live with her husband is good and reasonable, regard must be had to the social ideas and customs of the community to which the parties belong.

The word *adultery* in S. 488, Criminal Procedure Code, is not to be limited to the restricted definition given of it in S. 497, I. P. C.; but it should be construed in the ordinary and wider sense of voluntary sexual connection of a continuous character (not being isolated acts of immorality) between either of the parties to a marriage and some one, married or single, of the opposite sex other than the offender's own spouse.

Queen-Empress v. Mannathachari, I. L. R., 17 M., 260, overruled.
Appalamma v. Yellaya and *Perianayagam v. Kistna Chetty.* ... 303

Decree for Money:—*See* Civil Procedure Code (10).

Decrees of Foreign Courts against absent Foreigners:—*See* Jurisdiction of Foreign Courts.

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Dignities :—*See* CIVIL PROCEDURE CODE (1).

Distaint, unlawful :—*See* REVENUE RECOVERY ACT (3).

District Muncipalities Act IV of 1884 (Madras), Ss. 211, 212—*Drains, repair of, covering over—"New building," meaning of.*

The plaintiff, resident within the local limits of a mofussil municipal town, repaired and rebuilt a masonry covering over a municipal drain in front of his house without the sanction of the Muncipal Council. The Municipal Council removed the covering. The plaintiff then sued the Council for damages.

Held: that the act of the plaintiff did not fall within the last clause of S. 211 of the District Municipalities Act, IV of 1884 (Madras), inasmuch as the act of interference contemplated by that clause must be *sui generis* with the acts mentioned in the previous clauses of the section and the plaintiff's act was not of such a character ;

that the structure constructed by the plaintiff was not a new building within the meaning of S. 212 of the same Act and that the plaintiff was consequently entitled to damages.

The Municipal Council of Tanjore v. Visvanatha Row ... 273

Ejusdem generis :—*See* MORTGAGE WITH POSSESSION.

Endorsement :—*See* NEGOTIABLE INSTRUMENTS ACT (2).

1. **Enfranchisement** :—*See* KARNAM SERVICE INAM.

2. ——————— :—*See* INAM LANDS (1).

Enquiry, by Court prior to giving sanction :—*See* CRIMINAL PROCEDURE CODE (3).

False Charge :—*See* INDIAN PENAL CODE (2).

Family Necessity :—*See* HINDU LAW (2).

Full Bench of Presidency Small Cause Court :—*See* PRESIDENCY SMALL CAUSE COURTS ACT.

Gift incomplete :—*Trnsfer of deposit notes "not trnasferable."*

A testator some four days before his death being then indisposed (but not in contemplation of his early death) handed to his wife certain deposit notes of the Bank of Bengal, marked "not transferable" and added "After taking a bath I will go to the bank and transfer the papers to your name." The testator did not afterwards transfer the notes in the bank or do any act to complete his wife's title.

Held: that the gift was incomplete and that no legal effect can be given to it; that the mere handing of the notes to the wife did not amount to a transfer of the debt and that the other evidence amounted only to an intention to give.

Aga Mahomed Jaffer Bindaneem v. *Koolsom Bee Bee* 115

Gift of Corpus :—*See* WILL, CONSTRUCTION OF.

"Good Faith" Meaning of :—*See* TRANSFER OF PROPERTY ACT (1).

Grant by Government after Confiscation, Nature of :—*See* RELIGIOUS ENDOWMENTS ACT (1).

Grant to Widow :—*See* KARNAM SERVICE INAM.

1. **Guardian and Ward**—*Guardian and Manager, alienation by—Alienation by guardian and manager how far binding on minor—Limitation Act XV of* 1877, *Sch.* ii, *Art.* 44, 91,—*Deed cancellation of—Suit for possession without setting aside deed—Suit by a minor to set aside acts of a guardian.*

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Alienations by a guardian, of his infant's estate are void and are not binding on the infant except in so far as they can be shown to have been made for his benefit, or made under circumstances otherwise rendering them binding on him.

A suit by a minor who has attained majority to recover possession of properties alienated by his guardian by deed executed under circumstances not binding on him, is not governed either by Art. 44 or Art. 91 of Sch. ii of the Limitation Act, as it is unnecessary for him to get the deeds cancelled or set aside as a condition precedent to his recovering possession.

The plaintiff more than three years after attaining majority, with full knowledge of the facts, brought a suit for a declaration that a certain hypothecation deed executed by his guardian during his minority was not binding on him.

Held: that the suit was barred.

Kamakshi Nayakan v. *Ramasami Nayakan* 130

2. ——————:—*See* ALIENATION (1).

1. **Hindu Law**—*Adoption of wife's sister's daughter's son—Marriage of a wife's sister's daughter—Viruddha Sambandha—Texts of Hindu Law, mandatory and hortatory.*

The adoption to a Hindu of his wife's sister's daughter's son is valid under Hindu Law.

Neither under Hindu law as laid down by the *smritis* and expounded by the leading commentaries thereon, nor under any special or local usage, is the marriage by a Hindu of his wife's sister's daughter invalid.

The distinction between Hindu Law texts which are mandatory and those which are merely hortatory discussed and pointed out.

The text found in *Aswalayana's Grihya Parisishta* disapproving of marriages which are *Viruddhasambandha*, is only hortatory and not mandatory.

Minakshi v. *Rmanatha*, I. L. R., 11 M., 49 distinguished.

Under Hindu Law, adoption of a boy is to the adoptive father alone, whether the adoption is made by himself during his life or by his widow after his death; consequently, the relationship of the adoptive mother to the natural father of the adopted boy cannot affect the validity of the adoption.

Sriramulu v. *Ramayya* I. L. R., 3 M., p. 15 followed.

Raghavendra Rao v. *Jayaram Rao* 134

2. ——————*Father's contract to sell, how far binding on after-born son—Antecedent debt—Family necessity.*

Where a contract made by a Hindu to sell ancestral immoveable property is enforced, the purchaser under the sale does not take the interest in the property of a son born to the vendor subsequent to the date of the contract and prior to the date of the actual transfer, if the contract was one made for a consideration which is not an antecedent debt, or which is not one required for purposes of the family.

Ponnambala Pillai v. *Sundarappayyar* 240

3. ——————*Inheritance—Bandhus exparte paterna preferred to exparte materna—Sapindaship mutual.*

According to the Hindu Law of the Mitakshara school, the son of the adopted son of a sister is a nearer *bandhu* and heir to a deceased Hindu than the son of his maternal uncle.

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The following rules hold good in determining priority of relationship among heirs of the same class in the Mitakshara school.

1. The nearer line excludes the more remote.

2. Haeirs *exparte paterna* take before heirs *exparte materna.*

3. In establishing his priority, a plaintiff has only to establish that he is the nearest heir to the deceased; it is not necessary for him to go further and show that the deceased is also his nearest heir.

4. Where no other definite rule can be gathered from the leading treatises of the Mitakshara school, a rule of preference may be based on the relative spiritual benefits conferred by the various competitors on the deceased and his ancestors.

Balusami Pandithar v. *Narayana Rao* 207

4. ——————*Inheritance—Will revocation of—Revocation of will—Conduct of testator and of persons claiming under will—Nature of estate which daughter's sons take—Obstructed heritage, nature of holding in—Self-acquired property converted into coparcenery property by joint treatment—Joint treatment of self-acquired property, what constitutes.*

The revocation of a will may be proved, not only by declarations of intent of the testator to that effect, but also by (1) evidence of the conduct of the testator with reference to the will and with reference to transactions concurrent with the will and so connected with it as to form part of the same transaction with it; and (2) evidence of the conduct of persons taking under the will and who know or must be presumed to have known from the beginning of the existence of the will, acting as if there were no will.

Under the Hindu law, the estate which daughter's sons take in property which they inherit from their maternal grandfather does not carry with it any right of survivorship. The daughter's sons hold such property only as tenants in common and not as members of an ordinary co-parcenery governed by the Mitakshara law.

In order that such property may be claimed by right of survivorship, there must be an arrangement by mutual consent, express or implied, between persons so inheriting, altering radically the character of their title to the estate by substituting a joint tenancy in place of a tenancy in common. If such consent is to be implied from circumstances, they should be unequivocal and should point unmistakably to an intention to effect a mutual transfer.

N and A, two Hindu brothers, inherited property from their maternal grandfather in 1884. A was then a minor; he attained his majority in 1889. In 1892 N died, and A then claimed the whole property to the exclusion of N's widow. A proved that he and N were living together and treating the property they inherited from the maternal grandfather as members of a joint undivided Hindu family, and in support of it, he proved the following circumstances:—(1) Joint messing and residence; (2) investment of surplus income of the estate in a joint trade, or in purchasing property in their joint names; unequal consumption of funds without any separate accounts; (3) but only one joint account for the whole family; (4) borrowing in joint names and payment by one, or borrowing in one of the brother's names and payment by the other.

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Held: that N and A originally took as tenants in common; that the circumstances relied on by A were not enough to convert the property into co-parcenery property and that N's widow was the heir to his share of the property and, that A had no manner of right to it.

Venkataramanayamma Garu v. *Appa Rao Bahadur Garu*... ... 143

5. ———*Son's liability—Mitakshara law—Mortgage of ancestral property—Suit by mortgagor against father and son—Antecedent debt—Form of decree.*

Under the Mitakshara law a mortgage by a father is not binding as a mortgage on the son's share of the ancestral property, in the absence of any proof of a debt antecedent to the mortgage or of family necessity even though the son fails to show that the debt was contracted for an illegal or immoral purpose.

Khalilul Rahman v. *Gobind Pershad*, I. L. R., 20 C. 328, dissented from.

Srinivasaswami Aiyangar v. *Ponnammal* 69

6. ———, *Partition—Civil Procedure Code, S. 317—Suit for partition by a member of a Hindu family against another who has purchased family property benami for the family.*

S. 317 is no bar to a suit by a member of a Hindu family for a division of the family property, brought against the other members and a certified purchaser of family property benami for the family in a sale held in execution of a decree against the family.

Meenatchi Ammal v. *Kalayanarama Aiyar* 213

7. ———*Reversioner's suit to recover property after the death of intervening female owner—Limitation Act, Sch. ii, Arts.* 141, 144.

A, a Hindu, died in 1880 leaving him surviving a daughter as his only heir. But immediately after his death, his daughter-in-law (the widow of his son who had pre-deceased him) got into possession of his property and held it adversely to the daughter. The daughter died in 1889. In a suit brought by the daughter's sons in 1893 to recover the property from the possession of the daughter-in-law:

Held: that Arts. 141, 148, Sch. ii of the Limitation Act applied, and that the suit was not barred by limitation.

Srinath Kur v. *Prosunno Kumar Ghose*, I. L. R., 9 C., 934, F. B.; *Sham Lall Mitra* v. *Amarendro Nath Bose*, *Ib.* 23 C., 460; *Cursandas* v. *Yundravandas*, *Ib.* 14 B., 482; *Mukta* v. *Dada*, *Ib.* 18 B., 216; *Tai* v. *Ladu*, *Ib.* 20 B., 801; *Ram Kali* v. *Kedar Nath*, *Ib.* 14 A., 156, followed.

Lachhan Kunwar v. *Manoharath Ram*, I. L. R., 22 C., 445, distinguished.

Venkatramayya v. *Venkatalakshmamma* 204

8. ———*Waste by widow—Reversioners entitled to injunction to restrain widow—Acts imperilling reversioners' interests.*

A Hindu widow in possession of her husband's estate exchanged some of the securities forming part of that estate and standing in her name for others in her brother's name. The securities so got by exchange made no reference whatever to the widow's title and by their language seemed to indicate that they belonged solely to the brother. In a suit by her husband's reversioners to restrain her from so exchanging the securities:—

Held: That the acts of the widow were such as would imperil the interest of her husband's reversioners; and

that they were entitled to an injunction restraining the widow from exchanging the securities in the way she did.

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Hurrydoss Dutt v. *Sreemutty Uppoornah Dossee*, 6 M. I. A., followed.

Muthu Lakshmi Ammal v. *Narayana Pattar* 216

Hypothecation bond payable on demand—"*On demand*," *meaning of—Limitation Act. Sch. ii Art* 132, 147.

A hypothecation bond executed in the year 1876, after stating the security and the amount of the loan, contained the following provision "I shall pay the said principal with interest at 10 percent. per mensem *on demand* by the holder. A suit was brought to realize the money due under this bond in 1893.

Held: That the mortgage money due under the bond became payable immediately on its execution and that no demand was necessary and that the suit was barred as the period of limitation allowed by law for a hypothecation bond executed prior to the Transfer of Property Act, was 12 years under Art. 132, Sch. ii of the Limitation Act.

Perianna Goundan v. *Muthu Veera Goundan* 315

Illustration to section, force of:—*See* INDIAN CONTRACT ACT (3).

Inam:—*See* LIMITATION (1).

Inam lands—*Karnam maniam, enfranchisement of—Widow, grant of inam putta to—Nature of grant.*

The effect of enfranchising and granting an inam putta to a widow, who is in possession of lands originally held by her husband and his ancestors as *Karnam maniam*, is to make an absolute gift of the lands to the widow which she can enjoy and alienate as full owner.

Durgamma v. *Kadambari Virrazu and others* 233

Indian Companies Act (VI of 1882) S. 34.—*Kuries—Chit-funds—Association.*

In order to constitute an "association" of more then twenty persons within the meaning of S. 34 of Indian Companies Act, (VI of 1882), there must be a joint legal relation between such persons so as to give rise to mutual rights and obligations.

See also Kuries.

Manchu Nair v. *Padmanabhan Nair*. 26

1. **Indian Contract Act—Act IX of 1826, S. 2**—*Proposal—Promissory note—Stamp.*

A letter requesting the addressee to lend a sum of Rs. 200 to the writer and asking the same to be sent to him through a third person and continuing "I will send these two hundred rupees with interest at Rs. 2-1-4 per cent. per mensem, and have it credited in this letter and get it back" is not a pro-note; but is a mere proposal for a loan and is consequently admissible in evidence though bearing no stamp.

Dhondbhat Narharbhat v. *Atmaram Moreshvar*, I. L. R., 13 B., 669, followed.

Ayyanna v. *Nagabhooshanam*, I. L. R., 16 M., 283, distinguished.

Narayanasami Mudaliar. *Lokanibalammal* 220

2. ——**Ss. 38, 43, 44-45**:—*See* MORTGAGOR AND MORTGAGEE (2).

3. ——————**S. 73 Ill. (n)**—*Debt, interest on, in the absence of a contract—Interest Act, XXXII of* 1839—*Illustration to a section has not the force of law—Maxim generalia specialibus non derogant.*

In the absence of an agreement or usage to the contrary, where a sum of money is due under a contract, the promisee is not entitled either to interest or damages by way of interest, on the sum due, except in cases which fall under Act XXXII of 1839,

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Indian Contract Act, S. 73, *Ill.* (*n*) considered.

An illustration to a section has not the force of law and does not form part of the section which constitutes the enactment.

Nanak Ram v. *Mahin Lal* I. L. R., 1 A, 495, *Koylosh Chunder Ghose* v. *Sonatan Chundar Barooie* I. L. R., 7 C., 132, referred to.

A subsequent general statute is not to be so construed as to repeal the provisions of a previous particular enactment unless there are express words to indicate that such was the intention or unless such intention appears by necessary implication.

Kamalammal v. *Peeru Meera Levvai Rowthan* 263

Indian Evidence Act, Ss. 74 and 78 :—*See* CRIMINAL PROCEDURE CODE, (2).

1. **Indian Penal Code Ss. 188, 290**—*Public Nuisance,—Criminal Procedure Code Ss. 143, 417—Cremation of dead bodies.*

The accused burnt a corpse on the cremation ground of their village, situated near the bathing ghat of another village and a public road and were in consequence charged with committing a public nuisance. The High Court held "In India the burning of dead bodies by the inhabitants of a village, in a particular spot attached to that village and dedicated for the communal purpose of cremation, in a manner neither unusual, nor calculated to aggravate the inconvenience necessarily incident to such an act as is generally performed in the country, is lawful and does not amount to a public nuisance, punishable under the Indian Penal Code." Thereupon the complainant applied to the Privy Council for leave to appeal, which was refused.

Vira Pillai v. Saminadha Pillai 33

2. ———**S. 211**—*Institution of criminal proceedings—False charge.*

When a person makes a false charge of a cognizable offence to the police against a specified person or persons, he "institutes criminal proceedings" against that person or persons within the meaning of S. 211, Indian Penal Code, even though the police after enquiry refer the charge to the Magistrate as false, and the Magistrate dismisses it also as false without making any further enquiry; and if the offence fall within the description in the latter part of the section, he is liable to the punishment provided therein.

Karim Buksh v. *Queen-Empress*, I. L. R., 17 C., 574, followed.
Nanjunda Rao v. Queen-Empress 16

3. ———**Ss. 268 290** :—*See* NUISANCE PUBLIC. (1).

4. ———**S. 497** :—*See* CRIMININAL PROCEDURE CODE (4).

Interest Act, :—*See* INDIAN CONTRACT ACT. (2).

———**on Debt in the absence of Contract** :—*See* INDIAN CONTRACT ACT. (2)

Joint Family Debt :—*See* SUCCESSION CERTIFICATE ACT (1).

Joint Treatment of Self acquired Property :—*Ssee* HINDU LAW. (4).

Judgment of appellate Court :—*See* CIVIL PROCEDURE CODE (16).

Jurisdiction of Foreign Courts—*Decrees of Foreign Courts against absent Foreigners—Personal actions.*

In a purely personal action, a Court has no jurisdiction to pass a decree against an absent foreigner who is not domiciled within the territorial jurisdiction of the country to which the Court belongs, or who has not in any other way submitted himself

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to its jurisdiction; and any such decree passed against an absent foreigner is an absolute nullity and cannot be made the basis of a suit in the Courts of the country to which such foreigner defendant belongs;

The defendant whose domicile was in British India was the chief partner in a firm which carried on trade in Kandy (Ceylon) which is foreign territory. The business was being carried on by another partner who resided in Kandy. The plaintiff who ordinarily resided in British India filed a number of suits against the firm in Kandy and had the summonses in those suits served on the risident partner. The defendant was not informed of these suits by his partner and he did not appear to defend them and decrees *exparte* were passed against him. The plaintiff now sued the defendant in British India on those decrees.

Held:—That the defendant could not constructively be held to have been a resident of Kandy at the time when the plaintiff originally brought his suits simply because he was a member of a firm whose place of business was at Kandy and that the plaintiff's suit cannot be maintained.

Nalla Karuppa Chettiar v. Iburam Saheb. 70

Jurisdiction:—*See* COURT FEES ACT. (1) (3).

1. Karnam service inam—*Enfranchisement, effect of—Office of karnam and maniam.*

Where karnam maniam lands are enfranchised and an inam patta is granted for them to the person who holds the office, the presumption is that the enfranchisement is for the benefit of the joint family of which that person is a member, unless he (or those who claim under him) can show that at the time of the enfranchisement the office did not belong to the joint family of which he is a member.

Venkatrayadu v. *Venkatramayya*, I.L.R., 15 M., 285, and *Venkata* v. *Rama*, *Ib.* 8 M., 249, explained.

Sitapati v. *Narasimham* 248

2. ———————— *See* LIMITATION. (1).

Karnavan, Decree against:—*See* MALABAR LAW;

Kuries, chit funds:—

Two persons organised a kuri or chit fund, styled themselves the proprietors of the kuri, and invited people to take tickets in it. A kuri consisting of more than twenty persons was thus formed. In this kuri, the right to collect subscriptions from the various ticket-holders, and the duty to pay them to the individual entitled to it periodically, rested with the two organisers alone. The necessary securities which each prize winner had to give for the payment of future instalments due by him, were given to these two individuals alone. These again were alone responsible to each individual ticket-holder to pay the periodical prize and to make good any deficiency which might be caused by the default of any ticket-holder in paying his subscriptions. The ticket-holders had no rights or duties *inter se*; they were responsible to the proprietor alone for the due payment of their subscriptions.

Held:—That such a kuri did not constitute a company, partnership or association of more than twenty persons within the meaning of S. 4 of the Indian Companies Act.

Ramasami Bhagavathar v. *Nagendrayyan*, (I. L. R., 19 M., 31), distinguished.

See ALSO INDIAN COMPANIES ACT.

Manchu Nair v. *Padmanabhan Nair* 26

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1. **Landlord and Tenant**:—*See* RENT RECOVERY ACT. (1) (2).

2. ——————:—*See* MALABAR TENANTS' IMPROVEMENT ACT.

Leave to institute suit:—*See* RELIGIOUS ENDOWMENTS ACT. (2) (4).

Lien for advance money—*Contract, rescission of—Purchase with notice of contract.*

A person who contracts with another to buy immoveable property and pays a portion of the purchase money in advance is, if he were subsequently to rescind the contract under justifiable circumstances, entitled to have a lien for the money so advanced on the property in the hands of his vendor and in the hands of a third person, even though such third person might have purchased it subsequent to the rescission and subsequent to the date fixed by the original contract for the conveyance, provided such third person had notice of the contract at the time of his purchase.

Mirasa Ravuthan v. *Abdul Kani Ravuthan* 234

Lien of unpaid Vender for purchase Money:—*See* LIMITATION ACT. (1).

1. **Limitation**: - *Adverse possession—Karnam service Inam.*

Certain lands were attached as inam to the office of Kurnam in a Zemindari village. There were two Kurnams for the village, and about the beginning of this century, the inam was divided equally and held separately by the two working Kurnams for the time being; and after them the lands were in the possession and enjoyment of their descendants who were also doing the service. The last working Kurnam in one of the branches died in 1844, and since then the lands have been held by his descendants as private property without being attached to any service. Neither the Zemindar nor the descendants of the other branch made any attempt either to fill the vacancy caused in 1844, or to re-attach the lands to the office.

Held:—That the possession of the lands became adverse both to the Zemindar and to the co-kurnam and his descendants.

Venkatarazu v. *Narayana murty*... 54

2. ——————*Appeal petition in forma pauperis rejected—Payment of court-fee after limitation and after rejection, no retrospective effect for—Appeal referred by District Judge to Subordinate Judge—Subordinate Judge competent to decide whether appeal is in time—Madras Civil Courts' Act, IV of* 1873, *S.* 13.

Where a District Judge refers an appeal preferred to him to a Subordinate Judge, the latter is the proper appellate court so far as that appeal is concerned, and the Sub-Judge has power to see whether the appeal is out of time and if so reject it notwithstanding the fact that the District Judge might have previously considered the same matter and come to a different conclusion.

Jhotee Sahoo v. *Omesh Chunder Sircar*, I. L. R., 5 C., 1. dissented from.

A petition of appeal was presented in proper time. There was an enquiry into the appellant's pauperism and the petition was finally rejected. The appellant afterwards paid the necessary court fee,—when the time for preferring the appeal had expired.

Held: that the payment of the court-fee after the time had expired could not have retrospective effect and cannot relate back to the time when the pauper petition was filed and that the appeal was barred.

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Krishna Bhatta v. *Subbaraya* 818

3. ——— '*On demand,' meaning of—Band payable on the happening of a contingency on demand—Right to sue, accrual of.*

A hypothecation bond executed in February 1882, after providing for payment of interest in monthly instalments at the rate of 1 per cent. per mensem, and for the payment of principal in two years contained the following stipulation on the part of the obligors. "If there be default . . . in paying the interest every month, I shall pay in full the principal with interest at 1½ per cent. per month or demand by the holders out of my said hypothecated properties." There was default in the payment of the very first instalment of interest. In a suit instituted in June 1894 by the obligee against the obligor for the realization of the money due under the bond:

Held:—that the plaintiff's right to sue accrued on the defendant's failure to pay interest according to the stipulation, that is in March 1882;

that the expression "on demand" must be regarded as equivalent "to immediately or forthwith;" and

that as the suit was instituted more than 12 years from March 1882, it was barred by the law of limitation.

Hanmantram Sathuram Pity v. *Arthur Bowles*, I. L. R., 8 B., 561 *Ball* v. *Stowell*, I. L R., 2 A., 322, distinguished.

Perumal Ayyan v. *Alagirisami Bhagavathar* 228

4. ——— *Possession under an unlawful alienation, adverse to the true owner.*

The plaintiff was transported for life in 1872. In 1873, his wife created a usufructuary mortgage on his property for Rs. 925. In 1878, another similar mortgage was created by her in favor of E. B., the consideration being the promise on the part of E. B., to pay up the former mortgage and an additional advance of Rs. 300. In 1882, E. B., assigned his mortgage to the defendant. In a suit by the plaintiff to impeach the usufructuary mortgage made by his wife as having been made without authority and to recover the property from the defendant on payment of Rs. 300.

Held:—That as E. B., and afterwards the defendant deriving title from E. B., were in possession from 1878, for more than twelve years, not only for the Rs. 300 which the plaintiff admitted, but also for Rs. 925 which he did not admit, the suit as put in court by the plaintiff was barred by limitation.

Mamunhi v. *Gri Sham Bhatta* 11

1. **Limitation—Act, XV of 1877, Sch. II. Art. 3 and 132**—*Lien of unpaid vendor for purchase money—Charge of unpaid vendor—Transfer of Property Act. S. 55, (4), (b).*

A suit by a vendor of immoveable property for recovery of unpaid purchase money, by enforcement of the charge against the property sold to which he is entitled under S. 55 (4) (b) of the Transfer of Property Act, is governed by Art. 3 of Sch. ii of the Limitation Act, and not by Art. 132.

Virchand Lalchand v. *Kumaji*, I. L. R., 18 B., p. 48.

Natesan Chetti v. *Soundararajayyangar* 275

2. ——— **S. 4**:—*See* Civil Procedure Code (5).

3. ——— **5**:—*See* Registration Act (2).

4. ——— **Sch. II Art 11**:—*See* Civil Procedure Code (14).

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5. ——————**Art. 12** *(a)—Suit to recover property by person not party to the sale.*

Art. 12 (*a*) of Sch. II of the Limitation Act has no application to cases in which dispossession is the cause of action alleged and the plaintiff in which was not a party to, or bound by, the previous sale.

Suryanna v. *Durgi*, I. L. R., 7 M., 258, overruled.

Khadar Hussain v. *Muhammad Hussian Sahib* 52

6. ——————**S. 14**—*Proceeding in wrong Court—Time during which, pending.*

Where a suit is instituted in a wrong court, which directs the return of the plaint to be re-presented to the proper tribunal, the proceedings in the 1st court continue, within the meaning of S. 14 of the Limitation Act, until that court is really prepared to deliver out the plaint.

Bapu Ammal v. *Govinda Padiyachi* 261

7. ——————**Art 44, 91** :—*See* GUARDIAN AND WARD. (1)

8. ——————**Art. 49** :—*See* RENT RECOVERY ACT (3),

9. ——————**Art. 95** :—*See* REVENUE RECOVERY ACT (2).

9a. ——————**Arts. 132, 147**—*See* HYPOTHECATION BOND PAYABLE ON DEMAND.

10. ——————**Arts. 141 and 144** :—*See* HINDU LAW (7).

11. ——————**Arts. 142, 144**—*Discontinuance of possession—Adverse possession.*

Discontinuance of possession takes place only when a person in possession goes out and is followed into possession by another.

A, the purchaser of a house from a junior member of a Hindu family, sued to recover possession of the house from the defendant who set up a title to it in himself and also pleaded limitation. It was found that the house belonged to the plaintiff's vendor's family, and was in the possession of the family anterior to 1880, that the plaintiff's vendor got an exclusive title to it under a partition-deed, dated 3rd November 1880, that at that time the house was in bad repair and was not occupied, and that A's vendor never entered into possession subsequently. The sale to the plaintiff was in November, 1891, and the suit was filed in November 1892.

Held: that the *onus* lay on the defendant to show that the plaintiff's title became extinguished by adverse possession on his (defendant's) part for over 12 years before date of suit, and that as there was no such proof, the plaintiff's suit ought to be decreed.

Kashinath Sitaram Oze v. *Shridhar Mahadev Patankar*, I. L. R., 16 B., 343 distinguished.

Lakshman Vinayak Kulkarni v. *Bisansing*, I. L. R., 15 B., 261 referred to.

Krishnammal v. *Pichannavayyan* 186

Madras Civil Court's Act IV of 1873, S. 12:—*See* COURT FEES ACT (3).

——————**IV of 1873, S. 13**:—*See* LIMITATION (2).

1. **Madras Forest Act V of 1882, Ss. 4, 10, 33**—*Duty of Forest Settlement Officer.*

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The Jenmi of certain lands in Malabar granted a perpetual permission to Government to fell timber and reserved to himself the right of washing for gold and digging pits for the capture of elephants. Subsequently, on the 17th January 1888, the Government issued a notification under S. 33 (*a*) of the Madras Forest Act and again on the 24th of the same month issued another notification under S. 4 declaring the lands "reserved forest." The Jenmi applied under S. 10 of the Act to the Forest Settlement Officer to determine his rights in the land. The Forest Settlement Officer refused to offer any commutation for the Jenmi rights and only considered the claims to compensation for the right of washing gold, pasturage, &c.

Held:—that by the second notification the Government superseded its first notification and intended to acquire a complete right in the land under Cl. 2, and that the Forest Settlement Officer was bound to enquire into and decide the question of jenmi's right to the land under S. 10 of the Forest Act.

Mana Vikraman Tirumalpad v. *The Secretary of State for India*... 18

2. ——————— **S. 90**:—*See* REVENUE RECOVERY ACT. (2).

Malabar Law:—*See* STANI

———————*Karnavans, status of—Decree against karnavan, nature of—Anandravans bound by decree against karnavan in his representative capacity.*

A decree made in a suit brought by or against the karnavan of a Nambudri ilom or Marumakkatayam tarwad, in his representative capacity, and conducted by him honestly and in the interests of the tarwad, is binding on the other members of the tarwad, though they may not have been made parties to the suit.

The rights and duties appertaining to the status of the karnavan of a tarwad discussed.

Ittiachan v. *Velappan*, I. L. R., 8 M., 484; *Sri Devi* v. *Kelu Eradi* Ib. 10 M., 79; *Subramanyan* v. *Gopala*, Ib. 10 M., 223, referred to and discussed.

Vasudevan Nambudri v. *Sankaran Nambudri* 102

Malabar Compensation Tenants' Improvements Act, Madras Act, I of 1887, Ss. 6 & 7—*Compensation for improvements, by tenant—Rent reduction of, meaning of.*

The words "right of a tenant to make improvements and to claim compensation for them" in S. 7 of Madras Act I of 1887, have reference not only to improvements to be made subsequent to the contract of the tenant referred to in the section, but also to improvements effected by the same tenant and under a previous lease before the contract.

Per. Davies, J.—The section refers to all improvements effected by a tenant after the 1st day of January 1886, referred to in the section.

Where a tenant after the expiration of a lease takes up a fresh lease from his landlord at a lower rent than that of the previous lease in consideration of his giving up his claim to compensation for improvements effected under the prior lease:—

Held: that under S. 7 of Act I of 1887 (Madras) the provision in the lease taking away the right of the tenant to the improvements was void.

Per. Subrahmania Aiyar J.—(*Davies, J.*, dissenting) that in ascertaining the improvement in such a case the fact that the second lease was given at a lower rent is not to be taken into

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consideration as that does not amount to "a reduction or remission of rent or any other advantage" within the meaning of S. 7.

Uthunganakath Avuthala v. *Thazhatharayil Kunhali* 93

Mahomedan Law—*Widow—Maintenance—Commission to executor or legacy—Covenant implied to pay rent by one who occupies the house of another—Rent by person occupying as care taker.*

A Mahomedan by his will made various dispositions of his property, appointed his nephew his executor and trustee, and directed that his executor and trustee should be entitled to a commission of three per cent. on the aggregate value of his entire property.

Held: that the commission, though given by way of remuneration, was but a gratuitous bequest and nothing more than a legacy to the executor and can consequently be paid only out of the one-third part of the testator's estate which he could validly bequeath.

Under the Mahomedan law, a widow is not entitled to maintenance out of her husband's estate in addition to what she is entitled to by inheritance or under his will.

Generally, where one occupies the house of another there is an implied covenant to pay an occupation rent. But this implication can be rebutted by circumstances, *e.g.*, by showing that the house was lent to the occupier, or that he was in it as a caretaker.

A Mahomedan woman was living with her husband in his house. The husband died leaving a will in which he had mentioned his wife as a residuary legatee. After her husband's death the woman continued to live in the same house and executors under the will did not give her any notice that she would be charged with an occupation rent.

Held: that she was occupying the house as a caretaker and that she could not be charged with rent for the period of her occupancy.

A Mahomedan widow cannot, by the Shia law, take any share of inheritance in the land on which buildings stand as well as in the value of the buildings.

See also GIFT INCOMPLETE.

Aga Mahomed Jaffer Bindaneem v. *Koolsom Bee Bee* 115

Maintenance to Widow :—*See* MAHOMEDAN LAW.

Marriage of a Wife's Sister's daughter :—*See* HINDU LAW (1).

Misconduct of Arbitrator :—*See* CIVIL PROCEDURE CODE (15).

Mortgage by Conditional Sale.—*Sale with a condition for re-purchase—Transfer of Property Act, S. 58, cl. (c).*

A deed of sale after reciting the consideration, the description of property sold and usual covenants for title, contained the following provisions, *i.e.*, that in the event of the vendor paying back the purchase money with interest at Rs. 1-9-0 per cent. per month at a particular time named in the document, the vendor was to recover the land, and that, in the interval, the vendee was to take possession of the property, collect the kist, and, after paying the Sircar dues, credit the balance towards the interest payable by the vendor. It was not proved that there was any great desparity between the actual value of the property and the amount for which it purported to be sold.

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Held: that the document was a deed of sale with a conditon for re-purchase and not a deed of mortgage by conditional sale.

Venkata Krishna Rao v. *Venkatachalam* 299

————**Extinguishment of** :—*See* MORTGAGOR AND MORTGAGEE (2).

———— **of ancestral Property** :—*See* HINDU LAW (5).

————**with possession**—*Invalidity of—Suit for possession—Relief ejusdem generis—Decree for money inconsistent.*

A mortgagee who had been dispossed of the mortgaged premises by the mortgagors sued for possession of the same, and for an injunction restraining them from interfering with his possession and for such other relief as the Court may deem fit. It was found in the course of the trial that the mortgage was invalid.

Held: that the only relief the plaintiff was entitled to in the action by virtue of his prayer for other relief *ejusdem generis* with his claim for possession and, consequently, that the plaintiff was not entitled to a decree for the recovery of the mortgage money from the defendant.

Chinnasami Aiyangar v. *Kuppusami Aiyangar* 50

1. **Mortgages, Priority of**—*Subsequent mortgagee paying off decree on prior mortgage.*

Two mortgages were executed on the same day, the 19th December 1882, in respect of the same property, one to C and the other to the plaintiff. C subsequently sued on his mortgages and got the usual decree. M then paid the decree-amount in 1893, entered up satisfaction of the decree and took a mortgage in his own name for that amount and for an additional sum lent at the same time. In a suit by the plaintiff for the realization of his money by sale of the mortgage property:—

Held: that C's mortgage merged in the decree that he obtained on it: that M, by paying off the decree—amount, was not entitled to the same rights that the assignee of C's mortgage would have had, and that the plaintiff was entitled to priority for his amonnt over M's mortgage.

Rupabai v. *Adimulam*, I. L. R., 11 M., 355, referred to and explained.

See also POST-DIEM INTEREST.

Subbaraya Chetty v. *Ganga Razulunruga* ... ...

2. ————————*See* TRANSFER OF PROPERTY ACT (6).

Mortgage subsequent, Priority of:—*See* MORTGAGOR AND MORTGAGEE (3).

1. **Mortgagor and Mortgagee** :—*See* TRANSFER OF PROPERTY ACT (4).

2. ————————*Payment to one of several mortgagees—Discharge of debt—Extinguishment of mortgage by payment of debt—Indian Contract Act, Ss. 38, 43, 44 and 45.*

A payment made to one of two persons jointly entitled under a mortgage bond can be pleaded as a valid discharge of the debt in an action brought by the other person interested in the bond.

Wallace v. *Kelsall*, 7 M. & W., 264, followed.

Homendro v. *Rajendro*, I. L. R., 3 C., 353, referred to.

Steeds v. *Steeds*, 22 Q. B. D., 540, dissented from.

The rights under a mortgage instrument are extinguished by payment of the debt. The law entitles a mortgagor to a registered receipt for his mortgage money, but does not exclude

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other evidence of payment, or make the giving of the receipt a condition precedent to the discharge of the property.

Maran v. *Ramanna Gaunden* 269

3. ———————— *Priority of subsequent mortgage—Subsequent mortgagee paying off decree on prior mortgage—Intention, evidence of.*

Certain property was first mortgaged to A in 1887, and then to B in 1890. Both A & B sued the mortgagor on their respective mortgages and got the usual decrees. After those decrees had been passed against the property, C advanced money to the mortgagor and took a mortgage in his name in 1891. Part of this money went in discharge of A's decree—debt. It was proved that C when he advanced the money intended part of it for the discharge of A's decree—debt, and intended also to keep alive A's mortgage. In a suit by C for the realization of his mortgage amount.

Held: that he was entitled to priority over B's decree to the extent of the amount advanced by him for the discharge of A's decree—debt.

Adams v. *Angell*, 5 Ch. D. 645 referred to (vide *Subbaraya Chetti* v. *Ganga Razulungaru*..........7 M. L. J., p. 18).

Purnamal Chund v. *Venkata Subbrayadu Reddiar* 198

1. **Negotiable Instruments Act XXVI of 1881, S. 4**—*Pro-note,—Unconditional undertaking to pay—Acknowledgment—General Stamp Act I of* 1879, *Sch. I Art.* 1.

A document ran as follows "The amount which I have this day received from you in cash is Rs. 700. This sum *I am bound to pay you*. Therefore, adding to this sum interest at * * * *I am liable to pay* * * *"

Held: that it was not a promissory note as the words "I am bound to pay" or "I am liable to pay" do not amount to an undertaking to pay.

Tirupathi Goundan v. *Rama Reddi* 294

2. ———————— **Ss. 13, 48**—*Pro-note not payable to a specified person—Endorsement.*

A pro-note not payable to a specified person or his order, or to the order of a specified person is not a negotiable instrument, and there is no objection to a transfer of such an instrument otherwise than by endorsement.

Pattat Ambadi Marar v. *Krishnan*, I. L. R., 11 M., 290, *Abboy Chetti* v. *Ramachndra Raj*, I. L. R., 17, M., 461, distinguished.

Udayar Pillai v. *Muthia Pillai* 231

3. ———————— **Ss. 32, 50, 120, 121**—*Suit on a pro-note—Suit by benamidar unsustainable.*

The payee of a pro-note was found to be benamidar for a third person in respect of the amount of the pro-note. In a suit by such a payee against the drawer for the recovery of the amount due under the note,

Held: that the payee being only a benamidar cannot sue on the note in his own name.

Ganapathy Nayakar v. *Saminadha Pillai* 64

"New building" meaning of:—*See* District Municipalities Act.

Notice to appear before Collector—*Collector Acting in a Judicial capacity—Place of hearing.*

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Notices to parties to appear before a Collector when acting in a judicial capacity, should specify the building or other specific locality where he will sit.

Sheshama Nayani v. District Forest Settlement Officer of North Arcot. 83

1. **Nuisance, public**—*Street, public encroachment on—I. P. C., Ss.* 268, 290.

An encroachment by a private individual building over a portion of a public street is a public nuisance within the meaning of S. 268, I. P. C., and is punishable under S. 290, I. P. C., whether any particular individual was actually injured or obstructed by the act or not.

Queen Empress v. Krishna Reddi 95

2. ———————— *See* INDIAN PENAL CODE (1).

Obstructed heritage:—*See* HINDU LAW (4).

Occupancy right—*Purakkudi tenants in taraf village—Onus of proof—Nature and quantity of evidence necessary for such proof.*

In a *taraf* village, the registered proprietor is entitled both to the *melvaram* and the *mirasaram*. If a *Purakkudi* tenant of such a village assert an occupancy right in himself as overriding the proprietor's right to cultivate his own land, he is bound to establish it as the right which he asserts is of a special character and would derogate from the ordinary incidents of property. Mere length of enjoyment in the capacity of tenants or *Purakkudies* irrespective of any other circumstances is not *primâ facie* proof of occupancy right.

The nature of the evidence necessary to prove occupancy right discussed.

Chidambara Pillai v. Thiruvengadathiangar 1

Occupancy right, Presumption as to:—*See* TRANSFER OF PROPERTY ACT (7).

Office:—*See* CIVIL PROCEDURE CODE (1).

"On demand" meaning of;—*See* LIMITATION (3).

Onus of proof:—*See* OCCUPANCY RIGHT.

Parties, Description of:—*See* CIVIL PROCEDURE CODE (4).

Partition:—*See* HINDU LAW (6).

Personal Actions:—*See* JURISDICTION OF FOREIGN COURTS.

Police Occurrence Report:—*See* CRIMINAL PROCEDURE CODE (2).

Possession, under an unlawful alienation:—*See* LIMITATION (4).

Post diem interest:—

A mortgage-deed executed on the 19th December 1882, after stating the amount borrowed, the property hypothecated, and the rate of interest agreed to, proceeded as follows:—"From this day forward we will continue to pay interest due on the 30th *Panguni* of each year. If we fail to pay the interest according to the day fixed, we will continue to pay interest on that interest amount. We will pay the principal amount by the end of *Ani* of *Partiva* year (July 14th, 1886); and we will take back this bond paying off an one occasion the principal and the interest that may then be due." In a suit brought by the mortgagee in 1893 for the principal and interest due up to that time under the mortgage instrument,

Held, following the decision of the Privy Council in *Mathura Doss v. Narind Bahadur Pall*, 6 M. L. J., 214 that the mortgagee was entitled to interest on the principal amount up to the date of plaint under the contract at the rate stipulated therein.

See also MORTGAGES, PRIORITY OF. (1)

Subbaraya Chetty v. Ganga Razulungaru 18

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Presidency Small Cause Courts Act, Ss. 37, 69—*New trial, application for—Full Bench of the Presidency Small Cause Court—Power to state case to the High Court—Civil Procedure Code, S. 622.*

When an application is made to the Full Bench for a new trial of a suit under S. 37 of the Presidency Small Cause Courts Act, XV of 1882, and such application is granted by the Court and the suit re-opened, the Full Bench disposing of such suit has power under S. 69 of the Act to state a case to the High Court.

Oakshott v. *The British India Steam Navigation Company*, I. L. R., 15 M., 179, distinguished.

Seshammal v. *Munnisami Mudali* 140

Promissory note :—*See* INDIAN CONTRACT ACT (1).

Pro-note not payable to a specified person :—*See* NEGOTIABLE INSTRUMENTS ACT (2).

Proposal :—*See* INDIAN CONTRACT ACT (1).

Public documents :—*See* CRIMINAL PROCEDURE CODE (2).

Public nuisance :—*See* INDIAN PENAL CODE (1).

Rateable distribution :—*See* CIVIL PROCEDURE CODE (10) (11).

Registration :—*See* RENT RECOVERY ACT (1).

1. ——————**Act, III of 1877, S. 17 cl.** (*b*) :—*See* RENT RECOVERY ACT (2).

2. ——————————————**S. 77**—*Suit to compel registration, limitation for—Limitation Act, XV of 1877, S. 5—Court closed when period expires.*

S. 5 of the Limitation Act does not govern suits under S. 77 of the Registration Act.

A plaintiff, who institutes a suit to compel the registration of a document under S. 77 of the Registration Act after the 30 days allowed by it, is not entitled to the benefit of S. 5 of the Limitation Act.

Veeramma v. *Abbiah*, I. L. R., 18 M., 99, followed.

Appa Rao Savaji v. *Krishnamurti* 94

3. ——————**VI of 1831, (Madras) Ss. 1 & 3**—*Village Blacksmith's Inam—Suit not cognizable by Civil Courts—Limitation Act S. 28.*

Blacksmith's and Carpenters' inams are also within the purview of Registration Act VI of 1831 (Madras).

Rights to property which cannot be enforced in Civil Courts by reason of Registration Act VI of 1831, are not extinguished under S. 28 of the Limitation Act, XV of 1877, as the latter Act does not prescribe any period of limitation for suits under the regulation aforesaid.

Pichuvayyan v. *Vilakudiyan* 93

Religious Endowments Act, XX 1863, S. 4.—*Confiscation by Government—Grant by Government after confiscation, nature of—Trustee, rights of Re-grant, nature of.*

The Maharaja of Tanjore was trustee of certain public pagodas in his dominions. After his death in 1855, the British Government took possession of all his property (public and private) by an act of state, but re-granted his private property to his family on the 21st of August 1862, in terms which placed the senior Rani, the other Ranies and the Rajah's daughter in the

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same position which they would have occupied under Hindu Law, had no confiscation taken place. With regard to the public pagodas of which the late Raja was trustee, the senior Rani memorialised the Government on the 13th January 1863, in the following terms, "your memorialist prays that the pagodas and charitable institutions which have been founded from time to time by members of her family may now be made over to her as the head of the family for the time being." And the Government Agent recommended her request in the following terms, "Now, however, that the memorialist, H. H. Kamakshi Boyi Sahiba, has been recognized as the head of the family, and has had the whole of the private property of the late Raja made over to her, I conceive that the Government will be disposed to accede to her request, as far as it relates to the management of the pagodas." On these materials, the Government wrote on the 19th March 1863, "It is desirable that the connection of Government with the pagodas should cease, and they will accordingly be made over to Her Highness Kamakshi Boyi Sahiba," the senior Rani.

Held:—That the grant to Kamakshi Boyi was that of a widow's estate, and that it put her in the position which she would have enjoyed under Hindu Law had there been no confiscation on the death of the Rajah and that the British Government being competent to deal with the pagodas in such manner as they thought fit, treated them as institutions falling under S. 4, of the Religious Endowments Act, XX of 1863, and made an absolute transfer of them to the family without any reservation of a reversionary right to make new appointments of trustees as opportunities may arise.

Kalyanasundaram Aiyar v. *Umamba Boyi Saheb* 324

2. ———————————— **S. 18**—*Leave to institute suit—Judicial proceeding.*

A sanction given at the instance of a petitioner under S. 18 of the Religious Endowments Act, XX of 1863, for leave to institue a suit, without first giving notice to the counter-petitioners and hearing their objections, if any, is a legal sanction.

Venkatappayya v. *Venkatapathi* 84

3. ————*Suit relatingto charitable Endowments*:—*Advocate-General, party to it—S. 30 Civil Procedure Code—Leave under S. 30, not condition precedent.*

In suits relating to religious and charitable endowments, the Advocate-General may be a party in the same manner as the Attorney-General is in England; but his presence is not indispensable as that of the Attorney-General in England. Any persons interested in such endowments, *e.g.*, devotees, may bring such suits without joining the Advocate-General.

Section 30 of the Civil Procedure Code is permissive and not prohibitive. The granting of leave under that section is not a condition precedent, and may, therefore, take place after the institution of the suit.

Ramayyangar v. *Krishnayyangar*, I. L. R., 10 M., 185, followed.

There are two classes of cases to which S. 30 of the Civil Procedure Code applies—

Cases in which the number of persons claiming concurrent interest in the subject-matter of the suit, and therefore, according to the strict rule, necessary parties to it, is so large that they cannot all be conveniently joined with any chance of bringing the suit to a conclusion.

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2. Cases in which numerous persons have distinct but similar rights which might be prosecuted in distinct suits.

In the latter class of cases, any one or more of the persons interested may institute a suit on his or their behalf without joining the others similarly entitled. If, in any suit so instituted, objection is taken at the proper time, and the court thinks that it would be convenient to have all the others before it, it is competent for it to require an amendment of the plaint and allow the plaintiff or plaintiffs to apply for leave under S. 30, Civil Procedure Code. The omission to take this procedure at the outset is not itself a ground for dismissing a suit.

Jan Ali v. *Ram Nath Mundul*, I. L. R., 8 C., 41 } dissent-
Thakersay Devraj v. *Hurbhum Nursey*, I. L. R., 8 B., 460 } ed from.

Srinivasa Charry v. *Rangachariar* 281

Relinquishment for consideration:—*See* RENT RECOVERY ACT (2).

"Representatives" in S. 244 C. P. C. construction of:—*See* CIVIL PROCEDURE CODE (1).

Res-judicata:—*See* CIVIL PROCEDURE CODE (2).

Right to sue, accrual of:—*See* LIMITATION (3).

———————— **of co-sharer**:—*See* REVENUE RECOVERY ACT (2).

1. Rent Recovery Act, VIII of 1865, (Madras) Ss. 1 and 3 —*Inamdars, unregistered—Landlord and tenant—Registration not conclusive—Relationship of landlord and tenant by attornment.*

A registered inamdar is not by the mere fact of his name being registered in the revenue accounts, entitled to compel the tenants on the inam to accept puttahs and execute muchilikas under the provisions of the Rent Recovery Act.

Where an inam belongs to a joint Hindu family and is registered in the name of the eldest member of the eldest branch, but the tenants have for sometime attorned to a junior member and have been exchanging puttahs and muchilikas with him, it is not competent for the senior member to interfere with this relationship and compel the tenants under the provisions of Rent Recovery Act to accept puttahs from him as being the sole registered proprietor.

Quære: His remedy is to have his title to tender puttahs declared as against the junior member in a regular suit.

Raghu Gowdo v. *Gowdo Chandro Naiko* 243

2. ———————————————, **S. 12**—*Landlord and tenant—Relinquishment for consideration—Registration Act, III of 1877, S. 17, Cl. (b).*

Where a tenant relinquished his holding by an unregistered document in writing in favor of his landlord in consideration of the latter agreeing to give up his claims to arrears of rent due to him to the extent of six hundred rupees.

Held, in a suit by the landlord to eject the tenant, that the document in question was not a mere relinquishment as is contemplated by S. 12 of the Rent Recovery Act; but was one falling under cl. (*b*) of S. 17, Registration Act, and was consequently inadmissible in evidence, it being unregistered.

Appa Rao v. *Rameswara Rao* 59

1. Revenue Recovery Act, II of 1864, (Madras) S. 38— *Revenue purchase—Benami, proof of.*

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S. 38 of the Revenue Recovery Act, II of 1864, (Madras), does not preclude proof being given that the person whose name is entered in a Revenue sale certificate is not the person, or the only person who acquired a right under the purchase as evidenced by the certificate.

Subbarayar v. *Upadesiyar* 201

2. ——————————————————— **S. 59**—*Suit to recover property sold for arrears of revenue—Revenue Sale—Relief on the ground of fraud—Limitation—Limitation Act, IV of 1877, Sch. II Art. 95—Madras Forest Act S. 90—Co-sharer's right to sue—Civil Procedure Code, S. 43.*

The limitation provided by S. 59 of the Madras Revenue Recovery Act is applicable only to those cases where the plaintiff seeks to set aside a sale on the ground of fraud and has no application to cases where he seeks for some relief arising out of the altered relations between himself and the defendant consequent on the fraud practised on him. Art. 95 of Sch. II, of the Indian Limitation Act, XV of 1887, applies to such cases.

A mere co-owner of several properties is under no obligation to sue his co-sharers for division of all their joint properties in one suit when he wants the division of only one or some of them.

Kuppusami Aiyar v. *Subramania Aiyar* 73

3. ——————————————————— **S. 78**—*Distraint unlawful—Suit for the recovery of specific property illegally distrained—Limitation Act, Sch. ii, Art. 49.*

A landlord distrained his tenants' moveable property, under the provisions of the Rent Recovery Act, for the recovery of arrears of rent due to him.

It was found that the landlord had not delivered a pattah to the tenant before he distrained his property as required by law. In a suit by the tenant brought *bonâ fide* to recover from the landlord the specific moveables unlawfully distrained, or in the alternative for damages, but instituted more than six months from the date of the distraint:—

(1). *Held*: that the act of the landlord was one professedly done under the Rent Recovery Act, notwithstanding the fact that no pattah had been tendered;

(2). that the suit being one for the recovery of specific moveables, did not fall within the provisions of S. 78 of the Rent Recovery Act and was not, therefore, barred by reason of that section; and

(3). that the proper rule of limitation to be applied was that contained in Art. 49, Sch. ii, Limitation, Act.

Srinivasa v. *Emperumanar*, I. L. R., 2 M., 42, distinguished.

Rajah Kaundan v. *Rangaya Kaundan* 225

Riparian proprietors upper and lower, rights of—*Natural streams, water rights in—Diversion of water—Fair and reasonable use—Pleadings—Defect of allegation.*

An upper riparian proprietor has no right to dam back a natural stream running through his land, and take from it as much water as he likes, leaving only the surplus, if any, to the use of the proprietors below. Such a right is not a natural right and can only be acquired.

The natural right of an upper riparian proprietor is to take and use for the purpose of irrigation so much only of the water of the stream as can be abstracted without materially diminishing

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the quantity which is allowed to descend for the use of riparian proprietors below, and, without impairing its quality. The quantity which can thus be abstracted depends upon various circumstances, chief among them being the size of the stream and the proportion which the water abstracted bears to its entire volume.

The appellants placed within the limits of their own estate a dam across a natural stream flowing through their estate on to that of the respondents and diverted the water into a new channel leading to a *tal* or reservoir of their own. The respondents destroyed this dam and the appellants then brought the present suit for a declaration "that the plaintiffs are entitled to carry the water of the river to their reservoir by placing bandhs at any part of the river within the estate of the plaintiffs and that the defendants have no right to obstruct and oppose them." The plaint contained no averment or proof either as to the size and character of the dam or as to the quantity which it had the effect of diverting and did not state that the dam did not materially diminish the flow of the stream.

Held: (confirming the decision of the High Court at Calcutta) that the right as alleged and claimed in the plaint was excessive and cannot be allowed.

Debi Pershad Singh v. *Joy Nath Singh* 120

Sanction of Court executing decree:—*See* Civil Procedure Code (6).

Setting aside acts of guardian by minor:—*See* Guardian and Ward (1).

Son's liability:—*See* Hindu Law (2).

Specific Relief Act, 56, cl. (b):—*See* Civil Procedure Code (7).

Stamp Act I of 1879, Sch. I, Art. 1:—*See* Negotiable Instruments Act (1).

Stani, powers of—*Malabar law—Stanom, waste by stani.*

The stani of a Malabar stanom is not a mere tenant for life and is not impeachable for *waste* in the sense in which that word is used in English law. He represents for the time being the entire estate attached to the stanom and is not liable to be sued by the next reversioner to the office for any acts of his which do not injure the inheritance.

Rayiran Chathan v. *Thottinkara Moopil* 317

1. **Succession Certificate Act, VII of 1889, S. 4**—*Suit by a Hindu on a bond executed in the name of his deceased father—Debt of joint family.*

Where a Hindu sues upon a bond executed in the name of his deceased father, the presumption of law in the absence of any admission or evidence to the contrary, is that the debt due under the bond is one due to the joint family. No succession certificate need be produced in respect of such debt.

Palaniappa v. *Avatharaman* 195

———————————————*Suit by undivided son of deceased creditor—Debt of joint family.*

A Hindu is entitled to sue on a bond executed in favour of his undivided father, deceased, without the production of a certificate under Act VII of 1889, provided the debt for which the bond was executed is a joint family debt. For this purpose it is not necessary that the joint nature of the debt should appear on the face of the bond; it may be admitted or otherwise proved.

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Venkataramana v. *Venkayya*, I. L. R., 14 M., 377, referred to and explained.

The conflict between *Baij Nath Das* v. *Shamanand Das*, I. L. R., 22 C., 143, and *Fetēh Chand* v. *Muhammad Baksh*, I. L. R., 16 A., 259, noticed.

Subrahmanian Chetty v. *Rakku Servai* 100

Suits Valuation Act, VII of 1897, S. 8 :—COURT FEES ACT (3).

Tenancy from year to year :—*See* TRANSFER OF PROPERTY ACT (7).

Transferee of decree :—*See* CIVIL PROCEDURE CODE (8).

Transfer in fraud of creditors :—*See* TRANSFER OF PROPERTY ACT (1).

Transfer of deposit notes 'not transferable' :—*See* GIFT INCOMPLETE.

1. **Transfer of Property Act, S. 53**—*Good faith, meaning of—Transfer in fraud of creditors.*

When it is said that a deed was not executed in good faith, what is meant is that it was executed as a mere cloak, the real intention of the parties being that the grantor should retain the benefit for himself.

Where a debtor gave additional security to his mortgagee for a portion of his mortgage-debt and it was found that at that time there was a decree pending in execution against him.

Held: that the granting of the additional security was not bad as being in fraud of creditors.

Ramaswami Pillai v. *Audinarayana Pillai and others* 246

2. ——————, **55, 4** (*b*) :—*See* LIMITATION ACT (1).

3. ——————, **58, cl.** (*c*) :—*See* MORTGAGE BY CONDITIONAL SALE.

4. ——————, **S. 72, cl.** (*a*) & (*c*)—*Mortgagor and Mortgagee—Accounts, taking of—Costs of defending mortgagor's title—Costs of suits for the recovery of rent.*

In the taking of accounts between mortgagor and mortgagee.

1. A mortgagee in possession is entitled to be given credit to for the costs of any suit (including appeals therefrom) that he might have had to defend in protecting his mortgagor's title.

2. Such a mortgagee is not entitled to add to his principal money the costs of suits that he might have had to institute against tenants brought on the land by himself, for the recovery of rent.

Pokree Sahib Beary v. *Pokree Beary* 238

5. ——————, **S. 85**—*Mortgage suit, all persons interested necessary parties—Second appeal, dismissal of, for non-compliance with S. 85, Transfer of Property Act.*

Section 85 of the Transfer of Property Act is imperative, and the provisions contained in it must be strictly conformed to even in appeals and second appeals. A second appeal from a mortgage suit, in which all persons interested in the mortgaged property are not made parties, is liable to be dismissed for not conforming to the provisions of S. 85 of the Transfer of Property Act, even though all the interested persons had been joined in the court of First Instance.

Kisaran v. *Sankaran Nambudri* 266

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6. ———————, S. 101—*Mortgages, priority of—Mortgagee-purchaser of the right to redeem.*

A executed a mortgage to B in 1871. In 1876 he executed another to C, and in 1879, after an adjustment of accounts with B, he executed another mortgage for the balance found due, all the mortgages being on the same properties. In 1884, C brought a suit on his mortgage and purchased the mortgaged properties in execution of his decree. In a suit by B for sale of the properties and payment of his mortgage debt,

Held: that B was entitled to priority for payment of his debt which was virtually a debt of 1871 over that of C which was only a debt of 1876.

Rupabai v. *Audimulam*, I. L. R., 11 M., 346, and *Seetharama* v. *Venkatakrishna*, *Ib.*, 16 M., 94, referred to.

Alangaran Chetti v. *Lakshman Chetti* 8

7. ———————, S. 105, 106—*Occupancy right, presumption as to—Zemindars and rights, relative interests of, in land—Tenancy from year to year.*

According to what may be termed the Indian Common Law, the relations existing between zemindar in a zemindari village (or the Government or other person standing in the position of the zemindar in a Government village), and the ryot in actual occupation of the land comprised in such village is not that of landlord and tenant as understood in English Law, or that of lessee and lessor under the Transfer of Property Act, though the latter (the ryot) may be liable to pay an annual assessment to the former. *Prima facie*, a zemindar and his ryot, are holders of the *melvaram* and *kudivaram* rights in the land, respectively. Consequently, in a suit by a zemindar to eject a ryot in occupation, there is no presumption that the latter is a tenant from year to year. Before such a presumption can be raised in his favor, the zemindar must show that the *kudivaram* right vested in him or his predecessors at some time or other and that it afterwards passed to the defendant or some person through whom he claims. In the absence of such proof and in the absence of proof of any specified contract or of special or local usage to the contrary, a ryot in zemindari tracts is entitled to occupy his lands so long as he pays what is due, and if he should commit any default in this or other respect, until he is evicted by the processes provided by lands.

Venkata Narasimha Nayudu Bahadur v. *Dandamudi Kotayya* ... 251

8. ———————, S. 119—*Covenants implied in law and express covenants.*

An express covenant will do away with the effect of all implied ones. The rule is that in as much as covenants in law are intended to be operative only when the parties themselves have omitted to enter into any contract respecting matters to which the covenants in law relate, the latter cease to have any force the moment such a contract is entered into even though the contract expressly provides only for some of the matters covered by the covenants in law and is silent as to the rest.

The plaintiff and the defendant mutually effected exchange of certain lands on the 1st March 1891. On the 7th June 1891, the parties executed to each other certain documents styled "security bonds." The bond executed by the defendant contained the following provision;—"if any claim or dispute

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arises, I hereby bind myself to settle it. If I do not so get (the dispute) settled, I hereby bind myself to pay an amount not exceeding Rs. 4,014-8-6, at the rate of Rs. 1-4-0 per kuli land for lands which go out of your possession. This security bond shall be sustainable for 12 years from this date." In a suit by the plaintiff for the recovery of lands given by him in exchange on the ground that he had been evicted from the lands transferred to him.

Held: that the option to re-enter given to the plaintiff under S. 119 of the Transfer of Property Act was taken by the terms above referred to and the plaintiff cannot recover.

Subramania Aiyar v. *Saminatha Aiyar* 319

9. ——— ———, S. 135—*Company—Voluntary liquidation—Assets of Company, sale of, by liquidator—Purchaser of assets—Actionable claim, assets are not.*

Where a banking association goes into liquidation and the liquidator sells its effects, the purchaser of such effects is entitled to realize the full amount under any bond which may form a part of such effects; S. 135 of the Transfer of Property Act has no application to such sales.

Thevanna Chetti v. *Ramachandra Rao* 250

——— **Payment** :—*See* CONSIDERATION.

Valuation of suit for land :—*See* COURT FEES ACT (1).

Vesting order, effect of discharge of—11 & 12 *Vic., ch.* 21 § 7—*Attachment during the continuance of vesting order—Validity of attachment—Composition deed, effect of, on attachment.*

V applied to be declared an insolvent and a vesting order was issued in respect of all his properties on the 11th of January 1888. On the 23rd of January and the 7th of February 1888, R attached the properties in execution of a money-decree and got some of them sold. On the 17th of December, 1888, the insolvent petition was dismissed and the vesting order discharged. On the same day V executed a composition deed by which he vested all his properties in certain trustees for the discharge of his debts. In a suit by the trustees for a declaration that R's attachment and the sales thereunder were void and not binding on them:

Held: that the attachment and the sales were not void and that the composition deed could not affect the lien created in favor of R by his attachment.

Ramasami Kottadiar v. *Murugesa Mudali* 229

Voluntary Liquidation :—*See* TRANSFER OF PROPERTY ACT (9).

——— **payment**—*Rent, payment of, by person lawfully in possession—Liability of owner benefited to pay back.*

The interest of a Malabar tarwad in certain lease-hold property was purchased by the plaintiff in a sale held in execution of a decree obtained against the karnavan.

The plaintiff got into possession of the property, and during his possession paid rent to the landlord. Subsequently, the members of the tarwad sued to set aside the sale to the plaintiff and recovered possession. The plaintiff now sued the landlord and the members of the tarwad including the karnavan for the recovery of the rent paid by him during his temporary possession.

Held: that the landlord was not liable to pay back the rent paid to him by the plaintiff; and that the tarwad was liable to pay the same to the plaintiff subject to his accounting for the mesne profits realized by him.

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Dakhina Mohan Roy v. *Saroda Mohan Roy*, I. L. R., 21 C., 142 followed.

Imbichi Mamod v. *Manavikramasamathripad* 211

Will, construction of—*Alienation, restriction against—Rents and profits, gift of—Gift of corpus.*

A testator by his last will and testament directed that after his death the putta for a certain mittah should stand in the name of whoever was the eldest of his family, but that it should be enjoyed by his wife for life and that "he (the pattadar) should, after the death of my widow, divide the income of the zemin and give one share to my son K., one share to my grandson R., one share tomy grandson S., and one share to grandsons N., and S. P., and that whoever superintends the mittah should take Rs. 15 a month for the expenses."

Held :—That on a true construction, the will made a bequest of the *corpus* of the mittah to the persons mentioned therein and not merely of the rents and profits thereof;

And that it contained no prohibition against alienation or partition of the mittah and that it was perfectly valid.

Kanthimathinatha Pillai v. *Ramasami Pillai* 184

————, **Revocation of** :—*See* Hindu Law (4).

Waste by widow :—*See* Hindu Law (8).

Water rights in natural streams :—*See* Riparian Proprietors.

The Madras Law Journal Reports.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur J. H. Collins, *Kt.* Chief Justice, and Mr. Justice Muttusami Aiyar.

Chidambara Pillai and others ... Appellants.*

v.

Tiruvengadathiengar and others ... Respondents (*Plaintiffs*).

Chidambara Pillai v. Thiruvengadathiengar.

Purakkudi tenants in *taraf* village—Occupancy right—Onus of proof—Nature and quantity of evidence necessary for such proof.

In a *taraf* village, the registered proprietor is entitled both to the *melvaram* and the *mirasvaram.* If a *Purakkudi* tenant of such a village assert an occupancy right in himself as overriding the proprietor's right to cultivate his own land, he is bound to establish it, as the right which he asserts is of a special character and would derogate from the ordinary incidents of property. Mere length of enjoyment in the capacity of tenants or *Purakkudies* irrespective of any other circumstances is not *primâ facie* proof of occupancy right.

The nature of the evidence necessary to prove occupancy right discussed.

Appeal against the decree of the Subordinate Court of Kumbakonam in O. S. No. 4 of 1884.

The facts of the case appear sufficiently from the judgment of the Court.

T. Rama Row for appellant.

S. Subrahmanien for 1st, 2nd and 4th respondents.

The Court delivered the following

JUDGMENT:—The appellants, defendants, are the cultivating ryots of Periyakurvadi, a village in the District of Tanjore, and the respondents, plaintiffs, are trustees of Rajagopalaswami's temple at Mannargudi in the same District. It is admitted that the mirass of the village is in the name of the temple and that the annual payment made by the appellants to the respondents is made both on account of the *melvaram* (Government share of the produce) and of *mirasvaram* (proprietor's share of the produce). The

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* A. 1 of 1886. 20th December 1887.

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village in suit is not then of the class of villages in which the temple endowment is limited to the *melvaram* right. It is also not disputed that Periyakuruvadi is a *taraf* or assessed village and that, although no assessment is now paid, it is because of the recent assignment of the revenue due on the village in lieu of the annual money allowance paid by Government to the temple. It is clear, therefore, that the village was not one originally granted as *inam* for the support of the temple. We must take it then to be an ordinary *taraf* or assessed village registered in the Collector's books in the name of the temple as its proprietor or mirassidar.

The appellant's case was the temple was never entitled to, and that the trustees or panchayatdars never had actual possession of the village and that the appellants had the *kudikani* or occupancy right from time immemorial. Ordinarily the mirassidar or proprietor in a *taraf* village has the right of cultivation also and he is therefore at liberty to arrange for it from time to time either by granting leases or letting it to *purakudies* for *varam* or under what is usually called the *pannai* system by means of labourers who are paid wages in grain. The respondents stated in their plaint that appellants 1, 7, 9 and the fathers of 8 and 10 obtained a lease from the temple for 6 faslis from 1287 to 1292 on the 29th September 1877, that appellants 11 to 68 cultivated lands in the village together with the lessees, their relatives, and that, although the lease has expired, all the appellants wrongfully held over and declined to restore possession of the village. The plaint prayed for possession of 69 and odd velies of land together with their appurtenances, and for the recovery of Rupees 4,637-3-6, being the rent due for fasli 1292 together with the sum of Rupees 30 which was said to be the value of produce realized by the appellants in fasli 1293. Apart from the occupancy right asserted by the appellants, they resisted the claim also on several other grounds, and the issues recorded for decision by the Subordinate Judge sufficiently indicate the several matters in contest in this suit. The Subordinate Judge found all the issues in favour of the respondents and decreed the claim. The appellants object to the decree on several grounds.

The first objection taken in appeal is that the *onus* of proving the occupancy right is not on the appellants as observed by the

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Subordinate Judge. Admittedly the village in suit is a *taraf* village of which the temple is the registered proprietor entitled both to the *melvaram* and the *mirasvaram* as against the appellants. This being so, the claim of an occupancy right as overriding the proprietor's right to cultivate his own land is of a special character, and as such it is one which the party, seeking to derogate from the ordinary incidents of property, is bound to establish. Of course the appellants are entitled to the benefit of any presumption which may reasonably arise from the length of enjoyment and other special circumstances of the case. The contention that mere length of enjoyment in the capacity of tenants on *purakudies* irrespective of other circumstances is *prima facie* proof of occupancy right, cannot be supported. We shall consider hereafter whether the facts proved in this case give rise to any presumption in favor of the appellants, but we hold that the burden of proof was rightly cast on the appellants. Another objection taken in appeal is that the Sub-Judge is in error in holding that the appellants were not entitled to a notice to quit. The respondents' case was that the appellants got into possession under document A which purports to be a lease for the term of 7 years and that during the lease, they allowed the rent to fall into arrears and that on its expiration they denied the lessor's reversion or right of possession. If the respondents' claim is well-founded and the appellants continued in possession after the term by their own wrong, they are clearly not entitled to a notice to quit.

The next objection to the decree appealed against is that the respondents had no cause of action as against those appellants who were not parties to the lease sued upon and that there was a misjoinder of several causes of action. This contention is based on the assumption that those appellants are in possession of distinct portions of land in their own *kudikani* right and not, as alleged for the respondents, by reason of being let into possession by lessees as co-cultivators. But the Subordinate Judge has found in respondents' favor and in his view of the facts of the case, the decision is right.

The substantial question then for decision is whether the appellants have occupancy right, and they relied in support of their claim on Exhibits XV, XII, XVI to XIX, I to XI, XIII and

XIV and on oral evidence. Exhibit XV is a copy of the *pymash* or survey account prepared in 1839 and specifies among other things the rate of *purakkudivaram* or cultivator's share payable in the village. It states "Fixed quantity of *varam* payable to the *kudikani purakudies* of the said village is as per the karnam's account 30 out of 100 cullums of *kadappu* paddy" and so forth. In specifying the several house-sites, it mentions the name of a *purakudi* with the additional words "slave so and so" in connection with each hut and its back-yard. It purports to be signed by village officers, by certain ryots and by Mirass Karnam and Stanikam Rama Sastri and by Panchayat Periyakudi Rengamien. There is no specific evidence on the record to show that Rama Sastri and Rengamien were the servants or representatives of the temple at the time, and as observed by the Sub-Judge, the account was prepared by inferior revenue officials. The fact, however, that it comes from proper custody and that its accuracy has not since been challenged is in appellants' favor, but the weight due to it is not of itself considerable and must depend on the other evidence in the case. The entry as to the rate of *varam* purports to be taken from some karnam's account which is not in evidence, and although Exhibit XV is some evidence in appellants' favor, it is by no means conclusive.

Exhibit XII is a muchilika executed by the respondents to the late East India Company on 23rd August 1857 when the villages belonging to the temple were transferred by their management as trustees. In the 6th paragraph the trustees undertook "to treat the *purakudies* properly without ejecting them so long as they regularly pay rent, and in no way to damage or diminish the right and independence of *purakudies* according to the custom of the District and of the Village." This document is in favor of the appellants to the extent that it protects them against arbitrary or capricious ejectment, but it is against them in that it does not specifically refer to a hereditary right of occupancy or to *kudikani* right as vesting in the ryots of the village.

Documents I, Ia, II to XI, XIII and XIV evidence sales, mortgages and leases executed from time to time by the ryots of the village to one another and to strangers. They recite that the *purakudies* had a *kudikani* right and they were executed in 1848,

1850, 1859, 1860, 1864, 1872, 1876, 1880 and 1881. Though the trustees were no parties to them, they show that the ryots concluded those transactions openly in assertion of an occupancy right from 1848, and that they did so was presumably known to the trustees of the temple. Exhibit XVI to XVIII are copies of judgments, dated 1878 and 1879, in regard to certain house sites in the village which are not now in suit and their respondents or their predecessors were not parties to them. Exhibit XVI which is copy of a plaint in Original Suit 327 of 1880 refers to *kudikani* right in connection with the house site mentioned in it.

Exhibit XIX is copy of decision in Calendar Case No. 29 of 1879 on the file of the 3rd Class Magistrate of Neadamangalam, and the trustees were no parties to it. It shows only that there was a dispute between a ryot named Kamala Pillai and the village *purohit* as to whether the parcel of land originally held as *purohit mannyam* was taken back by the ryots 5 years previously and another parcel given instead.

As to the oral evidence, the appellants examined 15 witnesses, of whom six are defendants either on the present suit or in the cognate suit No. 29. The evidence of the defendants is discredited by the Subordinate Judge as interested testimony. The 12th and 13th witnesses are the village *purohit* and carpenter, and they are under the appellants' influence. Of the other 7 witnesses, the 14th and 15th only proved documents I and Ia and VIII. The 1st witness is a trustee of the temple and has held that position for 15 or 16 years. He denied of course the *kudikani* right set up by the appellants but admitted that the appellants have been ryots of the village during the time he has been a trustee, that the village is divided into 20 *karais,* that in the lease granted by trustees, the lands are not specified, their extent alone being mentioned, that the lessees cultivated themselves some lands and that those defendants who were not parties to the lease cultivated some lands together with the lessees. He stated further that there were 9 topes in the village and they had always been in the enjoyment of the temple. The witness has 200 or 300 velies of land besides dealings to the extent of Rupees 20,000 or 30,000.

The 6th witness is a mirassidar of Vikravandiyam, a neighbouring village. He deposed that the appellants enjoyed lands

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separately for about 30 years, and proved Exhibit IX. He also spoke to *karayedu* system or a periodic redistribution of lands among the ryots as obtaining in the village. The 7th witness is the karnam of Kuruvadi and the 8th witness is the mirasidar of a neighbouring village. They deposed that the appellants had *kudikani* right, that they enjoyed lands separately, and that the *karayedu* system obtained in the village. The Karnam referred to the survey account, and to sales and mortgages by ryots as his means of information. The 8th witness' father, it would seem, took a mortgage of the land cultivated by a ryot named Kattaperumal Pillai on the representation made by the mortgagor that he had *kudikani* right.

The foregoing is the evidence on which the appellants relied. No doubt the *pymash* account, if it can be impliedly relied upon, favors their contention. Exhibit XII shows only an undertaking by the trustees not to eject them as long as they regularly paid rent, and does not refer to any special tenure in the village. The other exhibits prove that the appellants and their predecessors sold and mortgaged their lands to others openly asserting that they had *kudikani* right from before 1848. Our attention is also drawn on their behalf to the fact that the leases granted by the trustees did not specify lands, that the ryots cultivated lands separately, and that on several occasions there was a redistribution of lands among the ryots,

We shall now turn to the evidence produced for the respondents. Documents A to Y Y are relied on as showing that the appellants were termed *purakudies,* and the Subordinate Judge refers to this portion of the evidence in paragraph 22 of his judgment, and explains to what defendants they relate. Although the term *purakudi* is not, as observed for the respondents, ordinarily applied to one who has an occupancy right, yet we are not prepared to accept it as conclusive on the point, and we may refer to the survey account in which the expression "*kudikani*" is used in conjunction with the term *purakudies* if *kudikani* ryots were also at times called *purakudies*.

The next group of documents on which reliance is placed for respondents consists of a series of leases commencing with J.J., the lease of 1841 and ending with the lease of fusli 1287 for 5 years.

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Of these, Exhibits J J, R R and X are muchilikas executed to Government during the period the village had been managed by officers of Government on behalf of the temple. Exhibit JJ was executed on the 1st October 1841 by five perons who designated themselves as *purakudies* residing in the village of Periyakuruvadi. The executants admitted that the village belonged to the temple, and that both *varams* were due to it. The documents stated the extent of cultivable land as per *Jamabandi dittam,* the extent that was waste or was liable to be submerged and the amount realized as per the *Jamabandi* on settlement of the previous year. Then the executants undertook to pay the kist due to Government, Rupees 2,404¾ and to pay 670 kalams of paddy to the temple and to hold the land for five years subject to the payment of rent at the same rate and then restore it. They next engaged not to cultivate waste land without previous intimation to Government, and not to injure and cut down live trees or branches, nor to fell and carry away withered trees, and to pay on default four times the assessment in the one case and four times the value in the other. Exhibit RR is a similar agreement executed by five other persons who described themselves as *purakudies* residing in the village of Periyakuruvadi. It was a lease for 7 years and the rent payable to the temple was 805 culums of paddy besides rupees 2,418 which the lessees undertook to pay direct as the assessment payable to Government. With reference to the cultivation of puramboke land, and as regards live trees and branches, and withered trees, this document contained provisions similar to those embodied in JJ.

Exhibit XX is another agreement executed for fasli 1256 by one Kamala Pillai and 9 others. The swamibhogam or the landlord's share which they undertook to pay was 850 cullums of paddy besides the kist due to Government of Rupees 2,417½. As regards the cultivation of puramboke land, the protection of trees, and the appropriation of withered trees, it contained the same provisions that documents JJ and R R contained.

These documents relate to the period when the village was under the management of Government, and their provisions may safely be taken to be *bonâ fide.* It is remarkable that there is no allusion in them, either direct or indirect, to any *kudikani* right hough document J J was executed very shortly after the *pymash,*

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They negative any right on the part of the ryots in regard to puramboke or to trees or to the nine topes which have admittedly been always in the enjoyment of the trustees. They show also that the rent payable varied from time to time and that it was not fixed in perpetuity. The stipulations in regard to trees and the cultivation of puramboke are not ordinarily inserted in farming leases, and convey the impression that the executants were regarded as cultivating *purakudies* rather than mere farmers of the landlord's right to rent for fixed periods. Seeing that the survey account XV indicates that there were about 65 ploughs and 69 *purakudies* in the village and that the extent of land under cultivation was over 69 velies, and seeing also that the documents rented out the whole cultivable area without further specification, it is not improbable that the lessees were themselves cultivating *purakudies*, that they were expected to cultivate together with other *purakudies* in the village, that they were selected as executants of the lease probably because they were the leading men or chief purakudies in the village for the time being and that the distribution of the cultivable area among themselves for purposes of cultivation was left to be adjusted by them at each lease or other intervals of time.

The next series of leases relied on for the respondents are leases granted in 1870 and they are referred to by the Subordinate Judge in para. 25 of his judgment. They show that the trustees departed from the previous practice of renting the whole cultivable area to a few chief *purakudies* and rented out specific number of karais to specific ryots or *purakudies*, and made the whole rent due in paddy and in cash payable direct to the temple. In these also there is no allusion to *kudikani* right. The last lease is document A on which the respondents brought the present suit. It exempted 3 velies and 13 mahs of land already leased out to Kamala Pillai and purported to let the remainder of the cultivable area to 10 of the appellants for 7 years for a rent of 2,090 cullums of paddy and Rupees 1,960 in cash. The ten lessees described themselves as *purakudies* residing in the village of Periyakuruvadi.

Our attention was called also to document C in the cognate case, Original Suit No. 29 of 1884. It purports to be a copy of the survey account relating to Muvanur Shrotriem village of which the ryots have admittedly an occupancy right and the document states distinctly that such right exists.

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Another document on which reliance was placed for the respondents is Exhibit UU. It is a security bond executed by 18 *purakudies* on the 21st September 1849 guaranteeing the payment of rent by the persons who executed RR. In describing the houses which they owned in the village and offered as security, they excluded the house sites and offered the superstructure alone as security. It is not explained why they did so if, as is now asserted for the appellants they had a *kudikani* right in the whole village.

As to the respondents' oral evidence, the Subordinate Judge attached no weight to it and it is not pressed upon our attention in appeal.

On comparing the evidence on both sides, we are of opinion that the Subordinate Judge is right in declining to attach weight to the entry in the survey account XV. The entry was apparently taken from some Karnam's account which is not before us and it refers to the *kudikani* right not directly, as is the case in C in Original Suit No. 24 of 1884, but incidentally by describing the *purakudies* as *kudikani purakudies*. The weight due to it is very much lowered by the absence of all allusion to an occupancy right in any one of the series of leases granted from 1841 to 1877. The right, if any, does not admittedly extend to the nine topes in the village and it is not satisfactorily explained why, if there was occupancy right in regard to the village generally, it did not extend to the topes also. Again Exhibit UU shows that the ryots who owned houses in the village had no property in their sites and the absence of such property is incompatible with the existence of a hereditary right of occupancy. Further the provisions which the several leases contain with reference to the cultivation of puramboke, the protection of trees and the appropriation of trees seem to indicate that this *kudikani* right, if any, did not extend to other than land under actual cultivation and this is not ordinarily the case where ryots have *kudikani* right to the village as contradistinguished from a perpetual lease granted with reference to a specific area. It is not the appellants' case that they or their ancestors had a perpetual lease from the temple.

Furthermore the provision in Exhibit JJ against arbitrary eviction so long as the *purakudies* pay rent regularly is inconsistent with the idea that they had an independent occupancy right. It

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shows on the other hand that so long as officers of Government managed the village, they did not arbitrarily or capriciously eject the ryots and that, when they transferred the village to the trustees, they obtained an undertaking from them to treat the cultivators in the same way. Seeing that the officers of Government had managed the temple villages for many years prior to 1857, it is not improbable that the consideration shown by them to *purakudies* as an incident of good management and the length of time for which the *purakudies* cultivated, inspired them with a belief that they were not liable to be ejected as long as they were punctual in the payment of rent. This may account for sales and mortgages by the appellants and their predecessors accompanied with an assertion of *kudikani* right which may loosely be used to indicate a permanent tenure of some kind or other.

It may be that the trustees took no notice of what the *purakudies* did as they undertook not to interfere with their occupation so long as they regularly paid rent. As to the suggestion made for the appellants that the leases were farming leases, we are not prepared to accede to it. They appear to be cultivation leases granted to the chief men among *purakudies* in order that they might, together with the other *purakudies* of the village, cultivate and fulfil their obligations under the lease. The non-specification of lands in the leases, the fact that each of the appellants cultivated separately and that there was an occasional re-distribution of lands held by the *purakudies* are referable to the conventional mode of leasing to chief men among the *purakudies* leaving it to them to select others who are to cultivate with them and to distribute the portions to be cultivated by each as may be arranged between them. As the rent is in arrear and as the appellants have set up a *kudikani* right which they did not possess, we cannot say that they can insist on the undertaking contained in JJ, even if it is valid as against the temple.

As to the appellants' contention that an occupancy right must be presumed in the circumstances of the case, we are unable to uphold it. There is no evidence of immemorial occupation as in the case of *Krishnaswami* v. *Varadaraja* and *Varadaraja* v. *Venkatachala*, I. L. R., 5 M., 345. Nor are the leases for terminable periods mere farming leases and the circumstance of their

having been granted to a few chief *purakudies* is referable to the mode in use of granting leases under what was known as the joint *Ijara* system or letting practically to the ryots of the village on the responsibility of the chief men. Again, sales and mortgages concluded from 1848 on the basis of a *kudikani* right may be the result of the practice introduced by Officers of Government of forbearing to eject the *purakudies* except for arrears of rent. We accept, therefore, the finding of the Subordinate Judge that the appellants have failed to establish the *kudikani* or the occupancy right set up by them.

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The decision of the Subordinate Judge on the other issues in this case is not seriously contested in appeal.

We confirm the decree of the Subordinate Court and dismiss this appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Shephard and Mr. Justice Subrahmania Aiyar.

Mammunhi ... ... Appellant* (4th *Defendant*)

v.

Gri Sham Bhatta and others ... Respondents (*Plaintiffs, 1st and 2nd Defendants*).

Limitation—Possession, under an unlawful alienation, adverse to the true owner.

Mammunhi *v.* Gri Sham Bhatta.

The plaintiff was transported for life in 1872. In 1873 his wife created a usufructuary mortgage on his property for Rs. 925. In 1878 another similar mortgage was created by her in favor of E. B., the consideration being the promise on the part of E. B. to pay up the former mortgage and an additional advance of Rs. 300. In 1882 E. B. assigned his mortgage to the defendant. In a suit by the plaintiff to impeach the usufructuary mortgage made by his wife as having been made without authority and to recover the property from the defendant on payment of Rs. 300,

Held :—That as E. B. and afterwards the defendant deriving title from E. B. were in possession from 1878 for more than twelve years, not only for the Rs. 300 which the plaintiff admitted, but also for Rs. 925 which he did not admit, the suit as put in court by the plaintiff was barred by limitation.

Appeal against the decree of the Subordinate Judge's Court of South Canara in O. S. No. 2 of 1893.

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* A. 216 of 1894. 2nd September 1896.

Mammunhi v. Gri Sham Bhatta.

The facts of the case appear sufficiently from the order of the Court.

K. Narayana Rao for appellant.

C. Sankara Nair for 1st respondent.

K. P. Madhava Rao for 2nd respondent.

On the 25th day of March 1896, the Court made the following

ORDER :—The plaintiff was transported for life in 1872. In 1873 his wife executed an usufructuary mortgage in favor of her brother, the sum secured being Rs. 925. In 1878 a similar mortgage was executed by her in favour of Iswara Bhatta, the consideration being the promise on the latter's part to pay off the former mortgage and an additional advance of Rs. 300. In 1882, within twelve years of the institution of the suit, Iswara Bhatta assigned his mortgage to the appellant.

It is contended on the appellant's behalf that, inasmuch as Iswara Bhatta took possession in 1878, and his possession and that of the appellant were adverse to the plaintiff, the suit ought to have been dismissed on the ground of limitation. On the respondent's part, it is argued that there is no evidence to show when, if ever, the possession under the mortgage of 1878 began, and further that the possession of the appellant was not wholly adverse, because it might be referred in part to a right to retain the land until payment of the Rs. 300 actually due by the respondent. If there had been a separate mortgage for this Rs. 300, this argument must probably have prevailed. But the appellant's case is that the possession of his assignor began under the same instrument which gave him a charge as well for the admitted debt as for the other sum, which, according to the respondent, ought not to have been borrowed. It is impossible to assign the appellant's possession to his right in respect of one debt more than the other.

If, therefore, before this suit was instituted, more than twelve years' possession had been enjoyed under the instrument of 1878, the respondent's right to impeach it to any extent must be held to be lost. There appears to be no distinct evidence as to when, if ever, Iswara Bhatta took possession. Considering the confused

way in which the plaint is framed and the questions presented in the issues, we think that the appellant is entitled to an opportunity of showing when his assignor's possession began. Fresh evidence may be taken. There must be a finding as to the question for what period, if any, he was in possession. Mammunhi v. Gri Sham Bhatta.

Findings are to be submitted within one month after the re-opening of the Court after the recess, and seven days will be allowed for filing objections after the findings have been posted up in this Court.

In compliance with the above orders, the Subordinate Judge submitted that his finding on the issue was that 4th defendant's assignor, Iswara Bhatta, was in possession from 1878 till the date of the assignment to the 4th defendant.

On receipt of this finding the Court delivered the following

JUDGMENT:—We accept the finding. The suit is barred by limitation as against the appellant. The appeal is allowed and the suit dismissed as against the appellant who is entitled to the costs in this Court and in the Court below.

We cannot give the 2nd respondent his costs. He need not have appeared.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur J. H. Collins, *Kt.*, Chief Justice, and Mr. Justice Parker.

Mana Vikraman Tirumalpad ... Appellant* (*Plaintiff*).

v.

The Secretary of State for India... Respondent (*Defendant*).

The Madras Forest Act V of 1882, Ss. 4, 10, 33—Duty of Forest Settlement Officer. Mana Vikraman Tirumalpad v. The Secretary of State for India.

The Jenmi of certain lands in Malabar granted a perpetual permission to Government to fell timber and reserved to himself the right of washing for gold and digging pits for the capture of elephants. Subsequently, on the 17th January 1888, the Government issued a notification under S. 33 (*a*) of the Madras Forest Act, and again on the 24th of the same month, issued another notification under S. 4 declaring the lands "reserved forest." The Jenmi applied under S. 10 of the Act

*S. A. No. 45 of 1894. 17th October 1894.

Mana Vikraman Tirumalpad *v.* The Secretary of State for India.

to the Forest Settlement Officer to determine his rights in the land. The Forest Settlement Officer refused to offer any commutation for the Jenmin rights and only considered the claims to compensation for the right of washing gold, pasturage, &c.

Held :—that by the second notification the Government superseded its first notification and intended to acquire complete rights in the land under Cl. 2 and that the Forest Settlement Officer was bound to enquire into and decide the question of the Jenmi's rights to the land under S. 10 of the Forest Act.

Second appeal against the decree of the District Court of South Malabar in A. S. No. 371 of 1892, modifying the decision of the Forest Settlement Officer, Nilambur, in claim No. 15 of 1888.

The facts of the case are sufficiently clear from the judgment of the Court.

K. R. Subrahmaniya Sastri for appellant.

The *Government Pleader* for respondent.

The Court delivered the following

JUDGMENT :—The appellant is the jenmi of certain land in Malabar. By karars, dated 9th January 1843 (Exhibit I) and 18th January 1858 (Exhibit A), he and his predecessors had granted to Government perpetual permission to fell timber on kuttikanom on certain properties subject to a payment of one rupee per tree. The karars further stipulated that no permission to fell timber should be granted to any one else, but that Government should not object to the jenmi washing for gold or digging pits for the capture of elephants.

On the 17th of January 1888, Government published a notification in the *Fort St. George Gazette* under Section 33 (*a*) of the Madras Forest Act, declaring that the Governor in Council was pleased to undertake from the 1st February 1888 the management of these forests, accounting to the persons interested in the same for his or their interests. This notification was published under Chapter IV of the Madras Forest Act, which deals with the control over forests and lands not at the disposal of Government or in which Government has a limited interest.

This notification was followed by a second on the 24 of January 1888, In this latter notification, Government intimated under S. 4 of the Forest Act, that it was proposed to constitute these lands "as reserved forests," and appointed a Special Assistant Collector of Malabar to be the Forest Settlement Officer to enquire into and determine the existence, nature and extent of any

right claimed and to deal with the same as provided in Chapter II of the said Act.

Mana Vikraman Tirumalpad v. The Secretary of State for India.

It is clear that, by this notification, Government intended to acquire complete rights in the land under Chapter II, for in order that land should be constituted a reserved forest, it is necessary that it should first be at the disposal of Government, *Kamaraju* v. *The Secreary of State for India*, I. L. R., 11 M., 309. In effect, therefore, the latter notification superseded the preceding one, since Government by applying all the provisions of Chapter II declared of the intention to treat the land as completely at its own disposal and not as land in which Government had merely a limited interest.

The Forest Settlement Officer was, therefore, a court with special jurisdiction and was bound to determine claims arising under S. 10 as well as under Ss. 11 to 13 of the Forest Act. The Forest Settlement Officer, however, first laid down that any claim he admitted on the part of the present appellant was to be binding upon a rival claimant who apparently was not before him and who was entitled to notice under S. 6, and he next refused to consider whether the land was at the disposal of Government, as to do so would be to question the authority of Government to appoint himself. He refused to offer any commutation for the jenmi rights, and only considered the claims to compensation for the right of washing for gold, of digging elephant pits, and rights of way, pasturage, etc.

By this procedure, Government, who under the karars had only the right to fell and plant timber upon the land, has taken the whole proprietary right of the jenmi without any compensation whatever. The ownership of the land did not pass to Government under the karars, nor was the jenmi right and title mortgaged; and, if at any time the Government had seen fit to abandon the rights of felling and planting timber which the karar gave, the right to the soil would still vest in the jenmi and not in the Government. Even under the karars, there is nothing to show that the jenmi parted with the rights of pasturage, or even rights of cultivation on lands not required for planting timber. If the Government merely intended to retain the management of property in which it had a limited interest, it was open to it under S. 33

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to apply such of the provisions of Chapter II as might be suitable, but by applying the whole Chapter and declaring the intention to constitute the land a "reserved forest," it is open to the claimant to demand that his jenmi right shall be dealt with under S. 10. The Forest Settlement Officer refused to deal with it, and, though the point was taken in appeal, the District Judge has not gone into the question, but has treated the case as though the only notification issued had been under S. 33.

We must set aside the decree and remand the case to the Forest Settlement Officer for disposal. The appellant is entitled to the costs of this appeal, and the costs in the Courts below will be provided for by the order of the Forest Settlement Officer.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur J. H. Collins, *Kt.*, Chief Justice, and Mr. Justice Benson.

Nanjunda Rao ... ... Appellant * (*Prisoner*).

v.

Queen-Empress ... ... Respondent.

Nanjunda Rao v. Queen-Empress.

Indian Penal Code, S. 211—Criminal proceedings, institution of—False charge.

When a person makes a false charge of a cognizable offence to the police against a specified person or persons, he "institutes criminal proceedings" against that person or persons within the meaning of S. 211, Indian Penal Code, even though the police after enquiry refer the charge to the Magistrate as false, and the Magistrate dismiss it also as false without making any further enquiry; and if the offence fall within the description in the latter part of the section, he is liable to the punishment provided therein.

Karim Buksh v. *Queen-Empress*, I. L. R., 17 C., 574, followed.

Appeal against the sentence of the Court of Session of the Bellary Division in case No. 57 of the calendar for 1896.

The facts of the case appear sufficiently from the judgment of the Court.

E. Venkatrama Sarma for appellant.

The *Public Prosecutor* on behalf of the Crown.

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* Criminal Appeal No. 384 of 1896. 29th October 1896.

Nanjunda Rao v. Queen-Empress.

The Court delivered the following

JUDGMENT :—The appellant was convicted of having made to the police a false charge of dacoity against certain persons and was sentenced under S. 211, Indian Penal Code, to suffer four years' rigorous imprisonment.

In appeal it is urged that, though the charge to the police may have been false, yet as they referred the charge to the Magistrate as false, and as the Magistrate ordered the charge to be dismissed as false without taking any action against the accused, there was no "institution of criminal proceedings" within the meaning of S. 211, and the offence was therefore only punishable with a maximum of two years' imprisonment under the first part of the section, instead of with seven years' imprisonment under the second part of the section.

In support of this view, the rulings of the Allahabad High Court reported in *Empress of India* v. *Pitam Rai*, I. L. R., 5 A., 215, and *Empress* v. *Parahu*, I. L. R., 5 A., 598, and *Queen-Empress* v. *Karim Buksh*, I. L. R., 14 C., 633, were relied upon. These cases no doubt support the construction of the section for which the appellant contends, but that construction was considered and dissented from by a Full Bench of five Judges of the Calcutta High Court in the case of *Karim Buksh* v. *The Queen-Empress* (I. L. R., 17 C., 574), where they followed a long series of earlier rulings of the same Court. We think that the view taken in the latter case is correct. We are unable to find any warrant or holding that the words "the institution of criminal proceedings" should be limited to the bringing of a charge before the Magistrate or to action by the Magistrate or police against the person charged. It seems to us that, when as in this case a charge of a cognizable offence is made to the police against a specified person, criminal proceedings within the meaning of the section have been instituted just as much as if the charge had been made before the Magistrate. It is agreed that when a charge is preferred to the police it merely sets them on enquiry, and they may find the charge to be false and refuse to proceed with the charge without the accused being even aware that any complaint has been made against him; but precisely the same may be the case when a complaint is made to a Magistrate. He is not

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bound to take any action against the person accused. He may refer the charge to the police for enquiry, and on receipt of their report may refuse to proceed or take any action against the accused person. In such a case the accused might be unaware that any complaint had ever been made. Yet it could hardly be contended that the complaint to the Magistrate did not amount to the institution of criminal proceedings within the meaning of the section.

We are of opinion as already stated that the true construction of the section is that laid down by the Calcutta High Court in the case we have referred to. Adopting that construction we find that the offence of the appellant in the case before us falls under the latter part of section 211, I.P.C., and the sentence is not illegal.

Looking to the gravity of the offence charged and the malice of the complainant, we certainly do not consider the sentence excessive. We confirm it and dismiss this appeal.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Shephard and Mr. Justice Davies.

Subbaraya Chetti and another ... Appellants* (*Plaintiffs*)

v.

Ganga Razulungaru and others ... Respondents (*Defendants*).

Subbaraya Chetti v. Ganga Razulungaru.

Mortgagor and mortgagee—*Post diem* interest—Priority of mortgages—Subsequent mortgagee paying off decree on prior mortgage.

A mortgage-deed executed on the 19th December 1882, after stating the amount borrowed, the property hypothecated, and the rate of interest agreed to, proceeded as follows:—"From this day forward we will continue to pay interest due, on the 30th *Panguni* of each year. If we fail to pay the interest according to the day fixed, we will continue to pay interest on that interest amount. We will pay the principal amount by the end of *Ani* of *Partiva* year (July 14th, 1886); and we will take back this bond paying off on one occasion the principal and the interest that may then be due." In a suit brought by the mortgagee in 1893 for the principal and interest due up to that time under the mortgage instrument:—

Held, following the decision of the Privy Council in *Mathura Doss* v. *Narind Bahadur Pall*, 6 M. L. J., 214, that the mortgagee was entitled to interest on the principal amount up to the date of plaint under the contract at the rate stipulated therein.

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*A. No. 113 of 1895 24th November 1896.

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Two mortgages were executed on the same day, the 19th December 1882, in respect of the same property, one to C and the other to the plaintiff. C subsequently sued on his mortgages and got the usual decree. M. then paid the decree amount in 1893, entered up satisfaction of the decree and took a mortgage in his own name for that amount and for an additional sum lent at the same time. In a suit by the plaintiff for the realization of his money by sale of the mortgage property,

Held, that C's mortgage merged in the decree that he obtained on it: that M, by paying off the decree amount, was not entitled to the same rights that assignee of C's mortgage would have had, and that the plaintiff was entitled to priority for his amount over M's mortgage.

Rupabai v. *Adimulam*, I.L. R., 11 M., 353, referred to and explained.

Appeal against the decree of the District Court of North Arcot in O. S. No. 33 of 1893.

This was a suit to recover the sum of Rs. 10,878, being the principal amount and interest due on a registered mortgage-deed, dated the 19th December 1892. The plaintiffs sued for a decree for payment by sale of the village Arunakulam mortgaged under the deed sued on. The mortgage-deed ran as follows:—"On looking into the account up to date in the presence of our gumasta Kamaraju Narayaniah, the amount including the principal and the interest, in respect of the bond executed on the 14th, November, 1879, to you and to your brother, Chengalroya Chetti, is Rs. 7,106-9-0, excluding the amount of Rs. 3,553-4-6 contained in the bond executed by us to-day to your brother Chengalroya Chetti, we are indebted to you for Rs. 3,553-4-6, which is to be given to you * * * . If we fail to pay the interest according to the date fixed, we will continue to give interest on that interest amount. We will pay the principal amount of rupees by the end of *Ani* of the *Parthiva* year; and we will take back this bond paying of on one and the same occasion principal and the interest that may then become due exclusive of the payments made; the payment made in respect of this must be entered on the back of this bond; if it is said that there has been other kinds of payment, such payment should not be admitted * * * ." Chengalroya Chetti, referred to in the deed, sued on his mortgage bond without making the plaintiff a party to his suit and obtained the usual mortgage decree in 1892. For the satisfaction of the said decree amount and for some other purposes the mortgagor borrowed a large sum of money from one Munisami Naidu and executed to him a mortgage of the plaint property in August, 1893, for the sum

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borrowed. Chengalroya, the decree-holder, was paid his debt out of the sum thus borrowed, and satisfaction was entered upon his decree. In the present suit, the plaintiff had made the mortgagor and Munisami Naidu defendants. The mortgagor contended that the plaintiff was not entitled to any interest on his mortgage amount beyond *Ani* of the year *Parthiva* (July 14th, 1886) as no interest had been stipulated for in the deed beyond that date. Munisami contended that, as he lent money for the purpose of paying off the decree on Chengalroya's mortgage, he was entitled to be placed in the shoes of Chengalroya and was entitled to priority over the plaintiff. The District Judge held that there was no stipulation in the deed to pay interest beyond the date fixed for payment of the principal; that damages alone could be given for the retention of the money beyond the date fixed for its repayment, and that the right to recover such damages had become barred as that suit was brought only in 1893, more than six years after the due date. As for Munisami's contention he held following the decision in *Rupabai* v. *Adimulam* (I. L. R., 11 Mad., 353) that Munisami was entitled to priority over the plaintiff. The plaintiff preferred this appeal to the High Court.

N. Subrahmanyam for appellants.

T. V. Seshagiri Aiyar for 4th and 5th respondents.

R. Shadagopachariar for 8th respondent.

The Court delivered the following

JUDGMENT:—Two points are raised in this appeal. The first relates to the claim for interest accruing after the due date fixed for the payment of the principal in the mortgage instrument of the 19th December 1882. The District Judge considers that the instrument contains no stipulation, express or implied, to pay interest after the 14th July 1886, by which day the mortgagor undertakes to pay the principal. He refers to one of the numerous cases dealing with the question of interest payable under a mortgage. It is not necessary to discuss those cases, firstly, because the question is entirely one of construction to be answered with reference to the language of the particular instrument, and, secondly, because we have a recent ruling of the Judicial Committee by which we must be guided in construing that instrument. (In appeal

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of *Mathura Das and another* v. *Raja Narind Bahadur Dal and others,* from the Allahabad High Court).

In this case, after stating how the sum of Rs. 4,797-10-6 has come to be due, the instrument goes on to say that "for the payment of the principal and interest which may accrue at the rate of ¾ rupee per cent. per mensem we have hypothecated, &c." Then the property is described and the instrument proceeds to state how the money shall be paid. The interest is to be paid on the 30th *Panguni* of each year and in case of default compound interest. The principal is to be paid by the end of *Ani* of the *Parthiva* year.

Now, it is true that there is not in terms a stipulation to pay interest after the end of *Ani* in the year *Parthiva,* and hence it is argued that the parties did not intend such payment to be made. But we have to look at other parts of the instrument besides the covenant to pay the principal on a fixed date. The amount found to be due and secured as principal is arrived at by calculating interest on sums originally due by the mortgagors, and the hypothecation is expressed to be for the payment of that principal and interest as it may accrue. That seems to show that interest was to be paid in the future as well as in the past. Then there is the clause providing for compound interest which certainly points to a liability for interest accruing after the due date. These provisions are more consistent than otherwise with an intention which in itself is the most probable one, when to use the language of the Judicial Committee regard is had to "the ordinary expectations of persons entering into a mortgage transaction." We should only be defeating those expectations if we held with the District Judge that the mortgage document carried no interest after the due date. We are, therefore, of opinion that, according to the right construction of the instrument, the mortgagor incurred the obligation to pay interest on the principal amount remaining unpaid on the 14th July 1896.

The other point taken is that which is raised by the sixth issue.

The District Judge has held that the sale of the mortgaged property made at the instance of the plaintiff, must be subject to the 5th defendant's claim. That claim arises in this way. On the

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date of the plaintiff's mortgage, another mortgage of the same property was executed by the same mortgagor in favor of one Chengalraya. On this mortgage, Chengalraya sued and obtained the ordinary decree, the plaintiffs not being made parties to that suit. That decree was satisfied by means of money borrowed from the 5th defendant, who thereupon took a fresh mortgage dated the 21st August 1893. It is contended that, as the 5th defendant's money has gone to pay off Chengalraya's mortgage, he must be entitled to the benefit of that mortgage, and that, accordingly, his claim must have priority over the plaintiffs. It is more than doubtful whether Chengalraya's mortgage ought to be treated as prior to the plaint mortgage of even date executed in Virasami's favour; but, apart from that, there is the circumstance that Chengalraya's mortgage has become merged in the decree obtained upon it. The 5th defendant cannot be in a better position than he would be if he had taken an assignment of Chengalraya's mortgage, and as assignee, he clearly could not rely on the mortgage after it had passed into a decree. He might have obtained a transfer to himself of the decree; but this he has not done and a transfer is now impossible since satisfaction has been entered up. In *Seetharama* v. *Venkatakrishna*, I. L. R., 16 M., 94, the fact that there had been a decree on the mortgage seems to have been overlooked, and the point now raised was not considered. On the second point also we think the District Judge has erred.

The appeal must, therefore, be allowed and the decree of the lower Court modified in the following respects :—

(1) The portions of it referring to the priority of the 5th defendant's mortgage must be expunged;

(2) The date for calculating the interest due to plaintiffs on their mortgage must be extended from the 14th July 1886, up to the date of suit, *viz.*, 30th September 1893;

(3) The date for payment by defendants Nos. 2 and 3 and 1st defendant's representative must be altered into the date, six months after the date of this decree; and

(4) The costs of the 5th defendant made payable by the plaintiffs must be disallowed, and the 5th defendant must be directed to pay the plaintiff's costs in both Courts to the extent to which he is liable on the case set up by him. The defendants Nos. 2 and 3 and 1st defendant's rspresentative must further pay the plaintiff's costs throughout on the larger sum now decreed against them.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Shephard and Mr. Justice Davies.

Krishnaswami Thatha Chariar and others. Appellants * (*Defts.*) 1, 3, 4, & 5.

Appanaiyangar .. .. Respondent (*Plff.*)

Krishnasawmi Thatha Chariar v. Appanaiyangar.

Civil Procedure Code, S. 11—Office—Dignities attached to an office in a temple—Dignities and emoluments inseparable—Suit for an office.

The plaintiff as purchaser of certain dignities and emoluments appertaining to the office of Malji Dharmakarta Miras in the Conjeevaram Devaraja Swami Devastanam, sued the trustees of the temple, for a declaration of his right to the incomes and *Swatantrams* appertaining to the miras and for the recovery of arrears of such incomes and *Swatantrams* unlawfully withheld from him by order of the defendants. Most of the items claimed by the plaintiff were really income possessing a money value, but some † of them savoured of mere dignities. But it appeared that these dignities had always been sold and mortgaged by the office-holders for the time being along with the incomes, and that such sales and mortgages had been recognised and enforced by civil courts, and that such dignities had always been treated as part and parcel of the office and inseparable from the incomes attached thereto.

Held :—That the plaintiff was entitled to the declaration sought for and for the recovery of the arrears claimed.

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* A. No. 83 of 1895. 24th November 1896.

† These items were—

1. A piece of flower garland adorning the idol's head.
2. The '*thulasi*' garland put on the idol when it is bathed.
3. *Manja capoo* or ground turmeric.
4. One large garland of flowers at the time of the distribution of garlands removed from the idol.
5. The placing of *satagopam*—gold or copper crown on the head.
6. The privilege of having lace cloth and betel-nut presented in two silver plates in the name of Attan Jeer during the ceremony of idol's marriage.

Krishnasawmi Thatha Chariar v. Appanaiyangar.

Appeal against the decree of the District Court of Chingleput in O. S. No. 18 of 1892.

The facts of the case appear sufficiently from the judgment of the Court.

K. P. Sankara Menon for *P. R. Sundara Aiyar* for 2nd appellant.

V. C. Seshachariar for appellants.

C. R. Pattabhirama Aiyar and *M. E. Srirangachariar* for respondents.

The Court delivered the following

JUDGMENT:—It is not disputed that plaintiff has bought the right to certain dignities and emoluments under the name of Malji Dharmakarta Miras in the Conjeevaram Devarajaswami Devastanam and also that these rights have been accorded to him and to his predecessors in title by the defendants.

The only question before us is whether these rights are recoverable at law. It is contended that they are only honours and dignities of a religious nature of which the civil courts have no cognizance. The character of the various rights claimed by the plaintiff are set forth in paragraph 29 of the lower Court's judgment. As regards Nos. 6 to 18 there can be no doubt that they possess a money value consisting as they do of the right to take money and food on the periodical occasions referred to. So that, the question is really narrowed down to items Nos. 1 to 5, which do appear to be only honours without any appreciable money value. We should have been inclined to think, had we been disposing of the matter for the first time, that these were rights not enforceable at law; but we find that from the year 1810 A.D. up to now, these rights have always been treated as part and parcel of the whole miras. They appear to be rights which are inseparable from the other rights. They seem to be so far in the nature of an office that they allow the holder of the miras to take part in the ceremonial services of the God; and out of this right, or we may say duty, springs the right to receive the dignities and emoluments appertaining to that service. As already observed, they have always been classed together and they have been mortgaged, bought and sold together. They were sold together by the Madras Supreme

Krishnaswami Thatha Chariar v. Appanaiyangar.

Court in 1843 (see the sale certificate, Exhibit P, wherein they are valued together under the style of "honours and incomes" at Rs. 104-11-8). They were the subject of a civil action in the District Munsif's Court of Trivellore in O. S. No. 346 of 1864. The same question was then raised on a remand as to whether these items, Nos. 1 to 5, were honours of a purely religious character, or not. Though the District Munsif held that they were, his decision was reversed on appeal by the District Court of Chingleput in appeal suit No. 66 of 1871. Although no specific reason was given by the Civil Judge for disagreeing with the Munsif, it must be observed that he was the same Judge who had previously raised the doubt as to whether these rights were recoverable at law or not, and he, therefore, ultimately came to the conclusion, that they were. Upon the Civil Judge's decision, the matter was brought to the notice of this Court, where it formed the sixth ground of appeal in special appeal No. 734 of 1872, and this Court dismissed the appeal. It must, therefore, be inferred that the learned Judges saw no reason for differing from the view of the Civil Judge. Though these decisions may not strictly operate as *res judicata*, we see no reason why we should differ from the conclusions already arrived at in that previous case by the District Court and by this Court. They doubtless proceeded upon the ground that it was impossible to divide or separate those rights which were rather dignities than emoluments from the miras or dharmakarthaship which comprised the whole. Not only have they been, as above shown, decreed together, but they have been executed by process of the Civil Court even as to the doing of the honours as well as with respect to the recovering of the fees (Exhibits S and T of 1857). In all these circumstances, we must treat the rights appertaining to the miras as one and indivisible.

The plaintiff is, therefore, entitled to the declaration which he has obtained by the decree in the Lower Court together with the decree which he has also obtained for the enforcement of his rights in future and for the arrears of fees now due to him.

The appeal is accordingly dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Davies.

Manchu Nayar and others ... Petitioners * (*Defts.* 2 to 6.)

Padmanabhan Nayar ... Respondent (*Plff*).

Manchu Nair v. Padmanabhan Nair.

Kuries—Chit funds—Association—Indian Companies Act (VI of 1882).

In order to constitute an "association" of more then twenty persons within the meaning of S. 34 of Indian Companies Act (VI of 1382) there must be a joint legal relation between such persons so as to give rise to mutual rights and obligations.

Two persons organised a kuri or chitfund, styled themselves the proprietors of the kuri, and invited people to take tickets in it. A kuri consisting of more than twenty persons was thus formed. In this kuri the right to collect subscriptions from the various ticket holders, and the duty to pay them to the individual entitled to it, periodically, rested with the two organisers alone. The necessary securities which each prize winner had to give for the payment of future instalments due by him, were given to these two individuals alone. These again were alone responsible to each individul ticket holder to pay the periodical prize and to make good any deficiency which might be caused by the default of any ticket holder in paying his subscriptions. The ticket holders had no rights or duties *inter se*; they were responsible to the proprietor alone for the due payment of their subscriptions:

Held,—That such a kuri did not constitute a company, partnership or association of more than twenty persons within the meaning of S. 4 of the Indian Companies Act.

Ramasami Bhagavathar v. *Nagendrayyan* (I. L. R., 19 M., 31) distinguished.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Subordinate Judge's Court of Palghat in small cause suit No. 1072 of 1895.

The facts of the case appear sufficiently from the judgment of the Court.

A. Narayanan Nambiyar for petitioner.

P. R. Sundara Aiyar for counter petitioner.

The Court delivered the following

JUDGMENT;—From the instances which have come before this court since *Ramasami Bhagavathar* v. *Nagendrayyan*, I. L. R., 19 M., 31, was decided, it would seem that a notion is coming to be

* C. R. P. No. 196 of 1896. 16th December 1896.

Manchu Nair v. Padmanabhan Nair.

entertained that every *chit* or *kuri* in which more than twenty persons are concerned falls within section 4 of the Indian Companies Act and therefore, if unregistered, is illegal. It is scarcely necessary to point out that whether an undertaking which generally goes by the name of *chit kuri* falls within the said section, depends of course, not upon the mere name given to the undertaking, but on the existence of the essential *characterestics* required by that provision of the law. Whether these requirements are present must be ascertained in each case. In the present instance the Subordinate Judge has paid attention to this matter. He has taken evidence as to it and has come to the conclusion that the case is not governed by the abovementioned section 4 and is distinguishable from *Ramasami Bhagavathar* v. *Nagendrayyan.*

The question is whether the Subordinate Judge's view is correct upon the facts established by the evidence. Now in cases like the present, to warrant the application of the section in question, the first point to be made out is that there is a 'company' or 'partnership' or 'association' consisting of more than twenty persons. It cannot be pretended that there is here either a 'company, or a partnership.' Is there then an 'association' of more than twenty persons within the meaning of the Act? The answer to this question depends upon the signification to be attached to the word 'association in the section. This and certain other points as to the construction of the corresponding section of the English Statute, the words of which are identical with those of the section of the Indian Act, underwent elaborate consideration in *Smith* v. *Anderson* (15 Ch. D., p. 247). There *James, Brett and Cotton,* L. J. J., differed from the construction put upon the section by *Jessel,* M. R.

For our present purpose it is enough to quote a couple of passages from the judgments of L. J. J. *Brett* and *Cotton* which deal with the interpretation of the term 'association.' The former observed,——"In order to come within this clause there must be a joint relation of more than twenty persons for a common purpose. * * * I confess I have some difficulty in seeing how there could be an association for the purpose of carrying on a business which would be neither a company nor a partnership, but I should hesitate to say that, by the ingenuity of men of business, there might not some day be formed a relation among twenty

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persons which, without being strictly either a company or a partnership, might yet be an association. But according to all ordinary rules of construction, if the association mentioned in section 4 is not, strictly speaking, a company or a partnership, it must be something of a similar kind. It must be a relation established between twenty persons or more 'for the purpose of carrying on business; *i.e.*, in order that such company, association or partnership may carry on the business. The business, therefore, whatever the word 'business' may mean is to be carried on by those twenty persons or more." (Ib. 277). *Cotton*, L. J., used the following language:—"I do not think it is very material to consider how far the word 'association' differs from company or partnership, but I think we may say that if 'association' is intended to denote something different from a company or partnership, it must be judged by its companions between which it stands, and it must denote something where the associates are in the nature of partners." (Ib. 282).

Clearly therefore to constitute an association, within the meaning of the section, the existence of a legal relation between more than twenty persons giving rise to joint rights or obligations or mutual rights and duties is absolutely necessary. Otherwise there would be a mere conglomeration of persons as L. J. Cotton put it, but not an "association."

Turning now to the facts of the present case it is perfectly plain from Exhibit I, which sets forth the terms on which the *kuri* is carried on, that no such relation exists between the various persons who have executed the document. The contracting parties are on the one hand, Kunhi Krishna Nayar and Panku Nayar, who organised the *kuri* and who are called the proprietors in Exhibit I, and on the other, each of the remaining ticket holders individually. The right to collect the subscriptions due periodically by each ticket holder rests only with the two organisers. The duty of paying the amount collected to the person entitled is cast upon them. It is to them that, unlike in the case of *Ramasami Bhagavathar* v. *Nagendrayyan*, the particular ticket holders who, as the prize winner has received the periodical collections, has to give the necessary securities for the payment of the future instalments due by him. Further, if any ticket holder commits any default in paying his subscriptions according to the instalments, the proprietors alone are

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responsible to make up the deficiency caused by such default and are consequently at liberty to admit at their discretion persons not mentioned in Exhibit I as ticket holders in lieu of defaulters. The only obligation each ticket holder lies under, is to pay his subscription from time to time to the proprietors; and the only right possessed by him is to get from them his several share of the Rs. 25 deducted at the drawing of each lot out of the total collections and distributed among the ticket holders other than those who have received prizes and also to receive from the same parties the amount of the prize when he in his turn becomes the prize winner. It is thus manifest that the only persons associated with each other in the sense of possessing joint rights or being subject to joint obligations or of having mutual rights and duties are the two proprietors, whilst the other ticket holders are in the language of L. J. James "from the first entire strangers who have entered into no contract with each other." (15 Ch. D. at p. 274).

It follows, therefore, that the very first condition laid down by the section relied on is wanting here.

In arriving at the above conclusion, we have not overlooked the observation made in one of the cases cited, to the effect that no hypercritical attempt should be made to withdraw from the operation of the legislative provision in question any case which reasonably falls within its purview. This is no doubt true. On the other hand, it is to be borne in mind that the enactment was intended, as stated by *James*, L.J., "to prevent the mischief arising from large trading undertakings being carried on by large fluctuating bodies, so that persons did not know with whom they were contracting, and so might be put to great difficulty and expense, which was a public mischief to be repressed." (15 Ch. D. at p. 273). When an Act framed with such intention is sought to be availed of for getting rid of obligations incurred in connection with comparitively small undertakings like the present, it carried on the responsibility of a very few known individuals and resorted to by ticket holders from prudential motives as a means of effecting some savings from their petty incomes, it is the duty of the courts to guard against the extention of the Statute, from an undue zeal for carrying out the policy of the enactment, to cases clearly not within its meaning.

Manchu Nair v. Padmanabhan Nair.

Being satisfied, as already stated, that here the very first requisite under the section has failed, it is unnecessary to consider the other question which was argued at length, *viz.*, assuming that ticket holders and the proprietors do constitute together an association of the kind contemplated by the section, whether the association can be said to have been formed for the purpose of carrying on business, having for its objects the acquisition of gain.

We agree, therefore, with the Subordinate Judge's conclusion and dismiss the petition with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur J. H. Collins, *Kt.*, Chief Justice, and Mr. Justice Benson.

Velu Goundan ... ... Appellant * (*Pltf.*)

Kumaravelu Goundan and others ... ... Respondents (*Deft.*)

Velu Goundan ... ... Petitioner. †

Kumaravelu Goundan and others ... ... Counter-Petitioners.

Velu Goundan v. Kumaravelu Goundan.

Court Fees Act, VII of 1870, § 7, cl. 4 (*b*)—Suits Valuation Act, VII of 1887, § 8—Madras Civil Courts Act III of 1873, § 12—Suit by a Hindu coparcener for partition and delivery of his share of family property—Jurisdiction—Subject matter of suit.

The plaintiff, a member of a joint undivided Hindu family governed by the Mitakshara law, sued for partition and delivery of his share of the joint family property. The value of the share claimed by him was below Rs. 2,500 but the value of the entire family property exceeded Rs. 4,000.

Held.—That the Court of the District Munsif of the place where the properties were situated, had jurisdiction to entertain and dispose of the suit;

and that § 8 of the Suits Valuation Act VII of 1887 had altered the law as laid down in *Vydianatha* v. *Subrahmanya* (I. L. R., 8 M., 235).

Appeal against the order of the Subordinate Judge's Court of Madura East, dated the 2nd November 1895, directing the return of the plaint presented by the appellant herein for presentation to the proper court.

Petition under Section 622 of Act XIV of 1882 praying the High Court to revise the order of the District Court of Madura in

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* A. A. O. No. 98 of 1896. 10th December 1896.

† C. R. P. 74 of 1896. Do.

C. M. A. 37 of 1895, confirming the orders of the Court of the District Munsif of Mana-Madura in O. S. No. 22 of 1895.

Velu Goundan v. Kumaravelu Goundan.

The facts of the case appear sufficiently from the judgment of the Court.

P. S. Sivaswami Aiyar for appellants.

The respondent was not represented.

The Court delivered the following

JUDGMENT :—Plaintiff, a member of an undivided Hindu family, sued for partition and delivery to him of his one-third share of the joint family property.

The value of the share claimed was below Rs. 2,500, but the value of the whole property exceeds Rs. 4,000.

The District Munsif following the ruling in *Vydianatha* v. *Subrahmaniya* (I. L. R., 8 M., 235) declined jurisdiction and returned the plaint for presentation to the proper court. His action was upheld on appeal to the District Judge. The plaintiff meantime presented his plaint to the Subordinate Judge, who also declined jurisdiction and returned the plaint to be presented to the proper court. The Subordinate Judge held that under section 7, cl. 4 (*b*) of the Court Fees Act the suit should be valued for purposes of court fees at the relief sought in the plaint, *viz.*, at the value of the share claimed which was less than Rs. 2,500, and that under section 8 of the Suit Valuation Act (VII of 1887) the valuation for purposes of jurisdiction should follow and be the same as that for court fees, and that, therefore, the suit was within the jurisdiction of the District Munsif. The view of the Subordinate Judge is in our opinion correct and in accordance with the law as laid down in the Suits Valuation Act, which it seems to us expressly altered by the law as laid down in the 8 Madras case.

Some doubt was sought to be thrown on this view by the fact that in three cases (*Khansa Bibi* v. *Syed Abba*, I. L. R., 11 M., 141, *Ramayya* v. *Subbarayadu*, I. L. R., 13 M., 26, and *Krishnasami* v. *Kanakasabai*, I. L. R., 14 M., 184) all decided after passing of the Suits Valuation Act the decision in 8 Madras was treated as still continuing the law applicable to the question. In those cases however, no reference was made to section 8 of the Suits Valuation

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Act nor did they directly declare that the ruling in 8 Madras still governs cases within its scope.

Moreover in the recent case of *Chockrapani Asary* v. *Narasinga Rao* (I. L. R., 19 M., 59) this Court expressly approved the view that where the suit relates to coparcenary property, unless it is one for general partition among all the shareholders, the specific and definite share claimed must be held to be the subject matter of the suit as stated in the Suits Valuation Act and Act III of 1873, (The Madras Civil Courts Act), and the value of the same should determine the Court's jurisdiction and not that set on the whole property which will of course, be the value of a suit in which a general partition of all the shares may be prayed for. We think that these words correctly set forth the law as it now stands. The present suit, therefore, being for a share of the coparcenary and not involving a general partition and the share being less than Rs. 2,500 in value, is within the jurisdiction of the District Munsif. We, therefore, confirm the order of the Subordinate Judge and dismiss this appeal and in exercise of our revisional jurisdiction we set aside the orders of the District Judge and of the District Munsif and direct the District Munsif to receive the plaint and deal with it according to law. Costs throughout will be provided for in the decree of the District Munsif.

IN THE PRIVY COUNCIL.

PETITION FOR LEAVE TO APPEAL.

Present:—Lord Watson, Lord Morris and Sir Richard Couch.

Vira Pillai v. Saminadha Pillai

Vira Pillai ... ... Appellant *

v.

Saminadha Pillai ... ... Respondent.

Public Nuisance—Indian Penal Code Ss. 188, 290—Criminal Procedure Code Ss. 143, 417—Cremation of dead bodies.

The accused burnt a corpse on the cremation ground of their village, situated near the bathing ghaut of another village and a public road and were in consequence charged with committing a public nuisance. The High Court held "In India the burning of dead bodies by the inhabitants of a village, in a particular spot attached to that village and dedicated for the communal purpose of cremation, in a manner neither unusual, nor calculated to aggravate the inconvenience necessarily incident to such an act as it is generally performed in the country, is lawful and does not amount to a public nuisance, punishable under the Indian Penal Code". Thereupon the complainant applied to the Privy Council for leave to appeal, which was refused.

Mayne.—My Lords, this is an application for special leave to appeal against a decision of the High Court of Judicature at Madras which reversed the conviction of the respondent on a charge under Section 290 of the Criminal Procedure Code.

Lord Morris.—Whom are you for?

Mayne.—The Public Prosecutor. The application is not made with a view of getting this man punished. The sentence imposed on him was a purely nominal one—25 rupees or something of that sort, but it is for the purpose of obtaining an authoritative decision from your Lordships as to the law of nuisance in India, as to which we submit that the decision of the High Court is not only wrong, but is wrong in a manner which is of great and general, and I may say also of national importance, as to what a party may do in the way of committing nuisances and yet keep strictly within the principles of the law.

Now my Lord, the course that this case took was this. Four persons, of whom the present respondent was the first, were charged with respect to the burning of the corpse of the first defendant's father at a place close within smelling distance of what is called the bathing ghaut belonging to the villagers who practically are the persons who made the complaint in the present case. Two charges were made: First, of a

* 6th February 1897.

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nuisance under Section 290, and, secondly, of disobedience to the orders of a public functionary who had ordered them not to commit that nuisance. The case first went before the Sub-Divisional Magistrate, and the Sub-Divisional Magistrate convicted the parties on both charges. It then went on appeal to the Sessions Court. The Sessions Court acquitted two of them absolutely—the third and fourth defendants. As regards the first and second it acquitted them on the charge of disobedience to the order of the Magistrate. No further question arises against that, for the decision if right or wrong on that point is not a matter of general importance, and we do not ask your Lordships to review it. But they were convicted upon the charge of committing a nuisance. Then it went to the High Court, and the High Court confirming the previous acquittal, then proceeded to acquit them of the charge of a nuisance upon the grounds which I have to bring before your Lordships which we submit are so wrong that an authoritative decision of your Lordships should be given, if your Lordships think they are wrong to set them right.

Lord Morris.—What power of appeal is there as a matter of right?

Mayne.—It is a matter of appeal to Her Majesty's prerogative. It can only be made by special leave to appeal.

Lord Morris.—In this country if a man is acquitted, nobody can appeal.

Mayne.—Yes, that is so.

Lord Morris.—What is the law in India?

Mayne.—In India there is an appeal.

Sir Richard Couch.—Is there any instance of Her Majesty having given an appeal against an acquittal.

Mayne.—Yes, certainly one. I do not know of any others; but there is certainly one so lately as 1873.

Sir Richard Couch.—Before the Privy Council?

Mayne.—Yes, in the case of the *Queen* v. *Edward Coote.* That was a case of appeal from the Court of Queen's Bench for the Province of Quebec. L. R., 4 P. C. p. 599.

Lord Morris.—What was that case?

Mayne.—That was a case in which the Court had acquitted the defendant.

Lord Morris.—Of what?

Mayne.—" A was indicted for felony."

Lord Morris.—A criminal offence?

Mayne.—Yes. Then. "At the trial the Crown put in evidence depositions sworn to by him, without being cautioned that what he so deposed to might be given in evidence against him, before Fire Commissioners empowered by the Quebec Statutes 31 Victoria, ch. 31, and 32. Victoria, ch. 29, to investigate the origin of any fires occurring in Quebec, and before any charge or accusation had been made against him." The Court acquitted him upon the ground that those depositions were inadmissible in evidence, and a petition was presented by the Attorney-General of the Province of Quebec.

Lord Watson.—In that case leave to appeal was given under a special clause in the Act which enabled the Judge to state a question of law in the form of a case from which an appeal would lie.

Lord Morris.—That is quite a different thing.

Lord Watson.—You are going to get us to say what is a nuisance in India. Leave was not granted here but in the Court below.

Mayne.—Not to appeal to Her Majesty.

Lord Watson.—Was not it?

Mayne.—No, not leave to appeal to Her Majesty. There was a case reserved, and upon the case reserved the Court "considering that the conviction is declared to be bad from a cause not depending upon the merits of the case, does hereby order that the said prisoner, Edward Coote, be tried anew on the indictment found and now pending against him, as if no trial had been had in the case."

Sir Richard Couch:—There was a case reserved.

Mayne.—Yes. Then he was discharged on his recognizance to appear for a new trial. Then "An application made by the Attorney-General for the Province of Quebec, to the Court of Queen's Bench, for leave to appeal to Her Majesty in Council from this judgment, was refused. A petition was then presented by the Attorney-General of Quebec to the Queen in Council, praying for special leave to appeal from the above judgment. The petition was heard by the Judicial Committee on the 30th April 1872"—and that application was granted.

Lord Morris.—But the Criminal Court could have given leave to appeal, could not they?

Mayne.—I do not know whether they could or not. At all events they refused it.

Lord Morris.—Was not there some power by which they could give leave?

Lord Watson.—I do not think there was any power given to any Criminal Court in British possessions to allow an appeal from a criminal order.

Mayne.—All cases of appeal in criminal cases are made here by special application to Her Majesty's prerogative.

Lord Morris.—In *Deeming's* case and other cases, on the part of the prisoner.

Mayne.—There was this one at all events.

Lord Morris.—If a man is tried for his life, we ought to take care a man is not put twice in peril of his life. It is quite contrary to one's ideas here.

Mayne.—It is here, but in India the Government has power to appeal against an acquittal. The Government in India has power under section 417 to appeal againt an acquittal. No one can appeal against an acquittal but the Government.

Sir Richord Couch.—The present Criminal Procedure Code gives an appeal against an acquittal to the High Court;

Mayne.—Yes.

Sir Richard Couch.—That is a comparatively recent introduction?

Mayne.—It is. It is under section 417, and the right of appealing against an acquittal is reserved to the Government.

Lord Watson.—That was an important feature and raised a pure question of law. What is the question of law you wish to raise here?

Mayne.—The question of law which is raised here is this.—

Lord Watson.—You began by saying it was a question of nuisance. I do not know any question of nuisance which is a pure question of law.

Mayne.—Here your Lordship sees all the facts were found by two Courts and admittedly were taken as the basis of a decision by the High Court, and perhaps it will be the simplest plan in order to show what I state is the question, to read the decision of the High Court.

Sir Richard Couch.—Should not we have to say if there was an appeal here whether upon the facts proved there was a nuisance?

Lord Watson.—Whether the facts proved and admitted showed a nuisance in the eye of the criminal law? Vira Pillai *v.* Saminadha Pillai

Mayne.—The High Court says, we know the facts, and the facts are conclusively found for these purposes.

Lord Watson.—That is, judging by Indian experience and what we know of the natives and their habits and requirements, we do not think what has been done can be fairly treated as a nuisance.

Mayne.—That is the point.

Sir Richard Couch.—That is not a matter we can decide.

Mayne.—I submit the principles laid down by the High Court are general principles applying to every case of nuisance.

Sir Richard Couch.—I do not doubt it—in the same circumstances.

Mayne.—Would your Lordship allow me to read the judgment? So much as is material of the three judgments has been copied in the petition. The facts are stated in the original judgment and are accepted.

Lord Watson.—I think it very likely that if I were to walk through the native part of any Indian city, I should look on everything I came across as a nuisance. That is exceedingly likely. Whether it ought to continue is a matter that is much better dealt with by the authorities there.

Mayne.—There is no doubt that is so, and an effort is being made by the Government at present to get rid of these things, and the im-important part of this decision is this. There are numberless Acts not only under the Criminal Procedure Code, but all sorts of local authorities which give the Magistrates power to remove nuisances and the importance of this decision of the High Court is that it pronounced authoritatively that certain things are not nuisances and cannot be nuisances.

Lord Morris.—Did you have a Judge and Jury in the case?

Mayne.—No, there was no Jury.

Lord Morris.—Do not they constitute themselves both Judge and Jury? Here you might bring an action for a nuisance, and it would always be a question for a Jury. Many employments are carried on which are very offensive, for instance, the manufacture of artificial manures, and so on; bells ringing in chapels and convents, and all sorts

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of questions may arise. It has to go to the Jury. In this case the High Court are Judge and Jury. Why should not they come to the conclusion that, having regard to all the circumstances of the case, the habits of the country and the habits of the people, &c., &c., it was not a nuisance.

Mayne.—The High Court in this third appeal to them, as the appeal is by revision, would have to take the facts as found by the Court below.

Lord Morris.—The facts are that this man was burning his grandfather. That would be the fact; it would not make any difference whether he burnt his father or his grandfather, but I suppose that was the object of the contention.

Mayne.—What they have found is that this was *primâ facie* a nuisance, but that it is the custom of the people to burn their fathers, and therefore they can burn their fathers wherever they wish.

Lord Morris.—Surely whatever is a nuisance here is not a nuisance there. I might consider it was a necessary thing.

Mayne.—Then the Court below have found not only it was a nuissance, but that they were doing this in a place where they had been forbidden to do it, and there being a special place pointed out and allotted to them for the purpose of performing this act, that they refused to perform it in this place.

Lord Morris.—There are slaughter-houses appointed in this country, and a man ought perhaps to slaughter his cattle there, but it does not necesarily constitute a nuisance if he chooses some other place.

Lord Watson.—It is very difficult to say what is a nuisance, because views change with regard to what constitutes a nuisance. In this country it has been chiefly effected by legislation. At one time most people thought a railway was a nuisance. I suppose the same character of considerations apply to the burning of a corpse in India.

Mayne.—The facts of the case are set out, and it is accepted that this was the character.

Lord Morris.—Why did they decide against you—that is the point.

Lord Watson.—What was the complaint made against these people.

Mayne.—The complaint is for a nuisance, and it was brought under section 290; "Whoever commits a public nuisance in any case not otherwise punishable by this Code shall be punishable by a fine which

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may extend to 200 rupees." Then you go back to the definition of nuisance as defined by section 268: "A person is guilty of a public nuisance who does any act, or is guilty of any illegal omission which causes any common danger, injury or annoyance to the public, or to the people in general who dwell, or occupy property, in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right. A common nuisance is not excused on the ground that it causes some convenience or advantage." Now my Lord that is the law that the Courts have to administer.

Now, my Lords, the facts as found and admitted for the purpose of the decision are these, and your Lordship will find them at page 8 of the proceedings of the lower Courts which, I think, are before your Lordships, but they are also set out verbatim in the petition:

"In the older time the villages of Thirukodikaval and Thiruvaduthorai lay on the opposite banks of the Kaveri. Thirukodikaval lay on the north bank and the burning ground of the village was on that bank. To the south of the river lies Thiruvaduthorai where there is a large and influential mutt. On the south bank was the Thiruvaduthorai bathing ghaut. Many years ago, it is not stated exactly how many years ago, the river shifted its bed a little to the north at the spot with the result that the burning ground of Thirukkodikaval is now on the south bank of the river and the Thiruvaduthorai bathing ghaut has necessarily been reconstructed close to the burning ground. Up to the year 1893 no objection seems to have been taken to the proximity of the burning ground. In the beginning of 1893, however, the Thiruvaduthorai people complained of the burning ground as a nuisance to the bathers and to persons who had occasion to cross the river at this place. The Taluq Board found that the removal of the burning ground was desirable, and a new site was purchased by the Thiruvaduthorai mutt and formally transferred by the mutt to the Taluq Board to be used as a burning ground for the people of Thirukkodikaval. The people of Thirukkodikaval continued to use the old burning ground, and on the 17th June 1893 the Sub-Divisional Magistrate of Kumbakonam prohibited their doing so by a notice issued under section 144, Criminal Procedure Code. This order of the Sub-Divisional Magistrate, or rather a revised order to the same effect, dated the 5th August 1893, was set aside by the District Magistrate in his proceedings, dated the 29th August 1893, on the ground that the case was not one of emergency. A copy of the District Magistrate's proceedings has been filed in this case, Exhibit III. The above facts which are admitted are fully set forth in that 'proceedings.' What was further done in the matter does not appear from the evidence on record. It is certain, however, that on the 11th August 1894, the District Magistrate issued a notification to the people of Thirukkodikaval and to the people of Thiruvaduthorai that, to avoid danger to human health, they were from the date of publication of the notification to cease using their burning grounds situated adjoining each other on the southern bank of the Cauvery and to use those otherwise provided and known to them. It was further notified that disobedience of the order would entail prosecution under Sections

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290, 291 and 188, Indian Penal Code. The complaint is that the accused in defiance of the above order did along with many other inhabitants of Thirukkodikaval on the 11th May last, burn on the prohibited land the corpse of one Vyapuri Pillai. The first and second accused admit they burnt the body at the spot in question, but plead that it is not a nuisance, and that they were not aware of the District Magistrate's order. The 3rd and 4th accused deny that they burnt any body on the ground in question."

Then at page 10, line 28: "With regard to the first plea, but little evidence, I imagine, is required to shew that the burning of a corpse must necessarily be most offensive to anybody in the vicinity. Many of the prosecution witnesses depose that the smell thereof has caused them sickness and headaches. Perhaps they are inclined to exaggerate the harm done, but, on the other hand, it verges on the grotesque for defence witnesses to come forward and swear that the smell of a burning corpse is to them an agreeable and pleasant odour. It is well established by the prosecution evidence that along the western border of the burning ground lies the road from Thiruvaduthorai village to the bathing ghaut where all the people of the village bathe, and further that this road is generally used by people who have occasion to go across the river to and from the Railway Station of Narasingampet and the villages about Thirukkodikaval."

Now that is expressly within the wording of the section, not only as being a common injury, danger or annoyance to the people in general who dwell on or occupy property in the vicinity, but also one which would cause serious injury to people who may have occasion to use any public right, that is, the public right of going along from the Railway to this village; and then it says it is not excused from any convenience or advantage.

Now, my Lords, the decision of the District Judge at page 4 of this paper says this:

"I apprehend there can be no question of the nuisance arising to bathers and passers-by from a corpse burning in their immediate vicinity. This, indeed, is scarcely disputed, but it is argued that bathers need not bathe just then, nor wayfarers use the path, and besides that the prosecution is not a *bona-fide* prosecution, quoad nuisance. The first argument needs no comment, in view of the definition of public nuisance in the Penal Code. As long as bathers and passers-by 'have occasion' to use their right of walking and bathing, and their right extends no doubt to all hours in the day and even in the right, they must be annoyed and even endangered by the noxious effluvia of a burning corpse, and it is well known that neither the length of time in which a nuisance has existed, nor the fact that it existed before it became a nuisance to the public can afford any excuse. As to the *bonâ-fides* of the prosecution, it is scarcely a matter for me to dwell upon. The moment the Thiruvaduthorai people take high ground and protest against this corpse burning for sanitary reasons, it is not, I apprehend, the business of the Courts to tell them that they have become suspiciously particular of late. They have a legal right to become, or pretend to become, sensitive in a matter of this kind, and there is abundant evidence that they choose to be sensi-

tive and aggrieved, and that on *bona-fide* sanitary grounds there is a nuisance is not disputed. I am bound to hold on the evidence that the burning of the corpse on the 11th May was, apart from the District Magistrate's order, a public nuisance and punishable as such."

Now, my Lords, the decision of the High Court upon this, your Lordships will find at page 2 of the next paper, the judgment on the criminal appeal.

Lord Morris.—They had been in the habit of doing this?

Mayne.—They had been in the habit of burning them in this way. Then, by a succession of orders they were told that they must not burn them there and a special place was bought and furnished for the burning where there could be no inconvenience to anybody, and an order was issued that they should not burn them anywhere except in this particular place.

Lord Watson.—What authority was there for that?

Mayne.—It was on that ground the second charge was made under Section 188.

Lord Watson.—The High Court held that order was without authority as burning on the site selected was lawful burning.

Mayne.—They particularly held that the act done was not a nuisance

Lord Watson.—They held that it was one of those acts which, though it may be offensive, is one of those nuisances allowed, that is to say, which the law recognises especially when they have been carried on apparently from time immemorial. The burning ground was not altered, and they burnt it on that burning ground.

Lord Morris.—It was an old burning ground?

Lord Watson.—Yes, and there would have been no offence but for the circumstance that a new burning ground had been provided, and they were told under a Magistrate's order to go there and not burn where they used to burn.

Mayne.—Yes.

Lord Watson.—The second ground of the judgment of the Court is that the order of the Magistrate was not binding.

Mayne.—This is their judgment:—

"Now, taking the case apart from the said notice, it is clear that the act of the accused falls under the limited class of cases sometimes designated as nuisances

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'legalised.' In other words it seems to be an instance of those compromises belonging to social life (alluded to by Pollock, C.B., in *Bamford* v. *Turnley*, 31 L.J. Q.B. at page 292) upon which the peace and comfort of that life mainly depend and in which some apparent natural right is invaded or some enjoyment abridged to provide for the more general convenience or necessities of the whole community."

I had better make my observations on that afterwards. Then it goes on:—

"In support of the above view, it is hardly necessary to observe that, not only the religious sentiments of all sections of the community, but also the requirements of general health and comfort, absolutely demand that corpses shall be disposed of as early as practicable, so as not to prove hurtful to the living. It is this imperative necessity that, as a general rule, casts upon persons having charge of corpses not only as a matter of social but also of legal obligation, the duty of arranging for the disposal of those corpses in a reasonably speedy, decent and inoffensive way (cf. the observations of Denman, Chief Justice, in *Queen* v. *Stewart*, 12 Adolphus and Ellis, at page 778 and of Lord Campbell, C.J., in *Reg.* v. *Vann*, 2 Denis, at page 330). And to facilitate the discharge of such an important duty, it has been, as is well known, the general and immemorial custom to set apart some spots for use by the public as places of sepulchre or cremation. The absolute necessity for some such common provision will become apparent on a moment's reflection. It is sufficient to refer to but one, not an unimportant, consideration bearing on the matter, namely, that the number of persons who are in a position to find for interment or cremation of the bodies of their deceased relations, friends or dependents places of their own, which, while being convenient to those persons themselves will not be a nuisance to others, is extremely small when compared with the millions of landless men and women who, if required to do so, would find it impossible to obtain such spots for similar use by them."

Of course, that is altogether outside the question. It is admitted that this is a perfectly proper and suitable spot provided for them if they choose to use it.

"Hence the existence of common burial and cremation grounds in almost every inhabited village in this Presidency except portions of the West Coast, where the conditions are somewhat different, owing to human dwellings not being crowded together as they mostly are elsewhere."

Lord Watson.—It is an old rule that the person who went to the nuisance must put up with it. I suppose that no person who went and built a house against the ground could ask for a Common Law injunction against the nuisance.

Lord Morris.—There was no power, apparently, of shutting up this old burning ground.

Lord Watson.—There does not appear to have been any authority.

Lord Morris.—That is what there is in this country or in Ireland. There is a power of shutting up anything of the kind.

Sir Richard Couch.—If there had been no order of the Magistrates at all—taking it there was no order—ought the persons then to have been convicted of a nuisance? Vira Pillai v. Saminadha Pillai

Mayne.—Certainly, I submit that they ought. I am bound to put the order out of the case, and I put it simply in this way.

Sir Richard Couch.—Then it comes to a question whether there was a nuisance.

Mayne.—It comes to the question whether it was a nuisance within the definition of section 268.

Sir Richard Couch.—That seems a matter for the Courts of India to decide.

Lord Morris.—We should not feel competent to decide that; or I should not myself.

Sir Richard Couch.—I should not have liked sitting as Chief Justice in India to have to decide whether it was a nuisance. I should have been obliged to do it, no doubt. Who were the Judges in the High Court?

Mayne.—Mr. Justice Subrahmania Aiyar and Mr. Justice Davies, an Indian and a European.

Sir Richard Couch.—A very able Indian Judge.

Mayne.—Then they say.

"In cases of this description, it is clear, adopting the language of Sir James Fitzjames Stephen (Digest of Criminal Law, 5th Edition, 197) the fact that the act complained of facilitates the lawful exercise of their rights by part of the public shews that it is not a nuisance to any of the public."

That certainly is a *non sequitur.*

Sir Richard Couch.—It is rather a delicate question to interfere with those rights of burning at places with Hindus. It is a question that would be a delicate one for us to interfere with.

Lord Morris.—I have known orders made for places to be shut up and then that has created riots in the district. The feelings of the people might be aroused in Ireland by rebellion and I suppose in India.

Mayne.—I should like to finish this part of the judgment. "The fact that the act complained of facilitates the lawful exercise of their rights by part of the public shews that it is not a nuisance to any of the public." Of course, that is an obvious *non sequitur* and it is op-

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posed to the principle laid down in the Penal Code that the convenience of the public is not to be an excuse.

Sir Richard Couch.—What everybody thinks is a public convenience must be in connection with other people's wishes and convenience too.

Mayne.—That, of course, is so; that is one of the important principles of the law of public nuisance.

Lord Watson.—If you are right in that according to the statute that we are to read it in the wide sense, every burning ground in India would be a nuisance if it gave anybody annoyance. It is quite impossible to construe the statute in that way.

Lord Morris.—We have no local knowledge of the feelings we might arouse amongst the people. That must be considered.

Mayne.—The case of *Banford* v. *Turnley* which is cited is really a leading case in support of the contention I am putting before your Lordships. That was a case which overruled a previous decision of *Barlow* v. *Hole*, which laid down the law very much in the way that it is laid down by the High Court here and the remarks of Chief Baron Pollock, which they refer to in that case were the remarks of the one Judge who is in the minority and opposed to the decision that was ultimately given.

Sir Richard Couch.—I think these questions of nuisance or no nuisance had better be left to the Courts in India.

Lord Morris.—It is a most extraordinary case to ask for an appeal here.

Lord Watson.—When you look at the facts in this way it becomes a most inconvenient thing to entertain questions of nuisance in India.

Sir Richard Couch.—Putting it most favourably for you, it is a mixed question of law and fact. You cannot put it higher than that. It is not a question of fine law.

Lord Watson.—I do not know anything that is a nuisance in law which is not a nuisance in fact. If it is not a nuisance in fact, it is not a nuisance in law. Do you know any law to the contrary of that? I am speaking of English law. Is there any difference in Indian law?

Mayne.—I know of no difference in India.

Lord Watson.—I know nothing which is regarded as a nuisance in the law of this country which is not in fact a nuisance to someone.

There are a great many things which are nuisances to many people which are not, in law, nuisances.

Mayne.—It is, of course, a well-known principle of English law.

Lord Watson.—If you put down nuisances in the way you are asking us to construe the Indian statute, you would put an end to a large part of the industries of some large cities.

Mayne.—I quite admit that all the decisions of the law of nuisance lay down this principle that when you are considering what is a public nuisance you must take into consideration what is the public to which the nuisance is addressed. The Courts say what is a nuisance in one place to one public is not a nuisance in another place; and Lord Cranworth said, in the well-known case of the *St. Helens Smelting Company* v. *Tipping* in 11 House of Lords cases, "What is a nuisance in Grosvenor Square is not a nuisance in Bermondsey. A degree of smoke which would be the ruin of Brighton is a natural and necessary mode of life of the people in Manchester and Glasgow.

Lord Watson.—It is not necessarily Manchester, for that is fairly free itself. It has a comparatively pure atmosphere now.

Mayne.—My recollection dates from a period of about 55 years ago when I was at school there and certain it was an awful place then. The general principle is, you must consider what is the public who are said to be affected.

Lord Morris.—This shews it is entirely a Jury question.

Sir Richard Couch.—This shews it is better in the hands of the High Court than here.

Lord Morris.—How can I bring myself to look at all the surrounding circumstances and the habits of the people. I should have to begin my life over again in my old age.

Mayne.—What I am submitting is that the general principles laid down by the High Court are wrong.

Lord Watson.—You are not complaining of their laying down general principles. You are complaining of their application of general principles.

Lord Morris.—In the circumstances of that case and of that locality and that country, they do not consider it is a nuisance or what should come within the strict difinition of a nuisance.

Vira Pillai v. Saminadha Pillai

Lord Watson.—They may be quite wrong in their view of the facts. It may be a misapplication of the principle.

Mayne.—First they laid down a principle that because the parties, long ago for a very considerable time before there was a bathing ghaut near them, had this as a burning ground; therefore they are entitled to continue to use this in preference to any other place.

Lord Watson.—That is the question. If you can shew that the order of the Magistrate was made by a person who had power to put down one and compel the use of the other that would be a difficult matter.

Mayne.—Then that would be punishable.

Lord Watson.—That is acknowledged by the High Court when they say the Magistrate had not the jurisdiction.

Mayne.—I put the Magistrate's jurisdiction out of the question.

Sir Richard Couch.—If an appeal were allowed and you came here, their Lordships would have to decide whether there was a nuisance or not, independently of this principle. We should have to say, was there a nuisance or not?

Lord Morris.—Having regard to the locality, the country, the habits of the people and their ideas.

Mayne.—What I submit the High Court has found is that that which is an admitted nuisance to the public in the vicinity and those using the public road backwards and forwards from the station to the village is a legalised act.

Sir Richard Couch.—Do you say it is an admitted nuisance?

Mayne.—I say it is an admitted nuisance.

Sir Richard Couch.—What is the admitted nuisance?

Mayne.—The burning at a place which is in the immediate vicinity of the bathing ghaut and alongside of a public road going from the station to the village.

Sir Richard Couch.—Until the Magistrate's order it was never interfered with.

Mayne.—It had been objected to for a long time, but it had not been authoritatively interfered with.

Sir Richard Couch.—No steps were taken to put it down as a nuisance.

Vira Pillai v. Saminadha Pillai

Lord Morris.—If you are right in your contention, the man ought to have been convicted, although the order of the Magistrate was illegal, and though there was no other place for them to do it. You rely on the strict definition. Even if there was no other place to do it, you would have to contend that he must be convicted, because you say it is an admitted nuisance, inasmuch as it offends people in the vicinity. The olfactory nerves of the people which were affected were the same in that particular locality as in the other place.

Sir Richard Couch.—It seems to have been considered necessary to have a Magistrate's order.

Mayne.—The object of having a Magistrate's order was first of all that it was supposed that this Magistrate's order had an absolute binding effect; but, in the second place, the Magistrate's order was used as a definite way of establishing the fact that there was a place pointed out and secured for them where the act could be done without its being a nuisance to anybody, and the fact that it was a nuisance to others was brought home to their minds by the Magistrate's order and the fact that there was another place appointed in which they could perform this act was also brought home to their minds.

Lord Watson.—You have satisfied me very thoroughly that this is not at all a suitable tribunal for sitting in review on such a case considering such questions of fact as most necessarily come up.

Mayne.—If there was any question of fact in dispute, I should quite admit I could not ask your Lordships to decide it.

Lord Watson.—There are questions of fact in dispute. The all-important question with regard to all these nuisances is whether, in a particular locality, they constitute a nuisance. It does not mean though a smell is insanitary, it is necessarily a nuisance.

Sir Richard Couch.—You take in all the circumstances.

Mayne.—You take in the circumstances of the case as shewing what are the public.

Lord Morris.—Every Judge is entitled to bring to bear on a case of this sort his own knowledge and his own ideas of daily life, and these Judges of the High Court in Madras know all about it and I know nothing at all about it.

Lord Watson.—There may be a qualification in the minds of some of the witnesses.

Vira Pillai v. Saminadha Pillai

Mayne.—We contend that the propositions laid down by the High Court, first of all the fact that the act had been a long time done in this particular place at a time when it was not a nuisance.

Lord Watson.—It comes to this that there are numbers of Hindus in that country who, according to the rites of their religion, must burn their dead in burning ghauts, and there must be nuisances somewhere.

Lord Morris.—And this was the place in which they were in the habit of doing it.

Lord Watson.—And everybody who comes in contact with the burning place will find it a nuisance. It does not follow that every burning place is a nuisance. As far as I can see, from time immemorial, it was done in this place. No Court would grant an injunction. Nobody complained of it for a long time.

Sir Richard Couch.—Not until you got the Magistrate's order. It does not seem to have been complained of seriously until you got the order.

Lord Watson.—On a general view of the facts it is as much a nuisance where it has been transferred to as where it was before.

Lord Morris.—Probably they do not like it, the same as people in England do not like to have a new burning ground in their neighbourhood.

Sir Richard Couch.—We should be taking on ourselves to decide whether burning places in India are a nuisance. I do not see how we can possibly do it.

Lord Watson.—It would simply be the introduction to a great number of very unsavoury questions of a similar character.

Lord Morris.—I do not think you can make anything of it, Mr. Mayne.

Lord Watson.—We should soon get charged with the whole sanitation of India, drains and everything else.

Mayne.—The object of this application was to enable sanitation to be possible.

Lord Morris.—The object was to heeltap that illegal order instead of mending it by legislation.

Petition refused.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Boddam.

Ramasami ... ... Appellant* (4th Defendant.)

v.

Gundappa and others ... ... Respondents (Plaintiff.)

Valuation of suit—Jurisdiction. Suit for land after demolition of buildings—Court Fees Act, VII of 1870.

Ramasami v. Gundappa.

In a suit by the plaintiff for the recovery of certain land after removing the buildings illegally erected thereon by the defendant, the value of the land alone is to be taken into consideration in estimating the value of the subject-matter of the suit and not the value of the buildings sought to be removed.

Second appeal against the decree of the District Court of Bellary in A. S. No. 122 of 1894, confirming the decree of the Court of the District Munsif of Penukonda in O. S. No. 288 of 1892.

The plaintiff sued as the heir of one Venkamma to recover certain lands in the occupation of the defendant. The plaintiff's case was that after the death of Venkamma the defendant had trespassed upon the lands and erected buildings thereon in spite of the notices given by the plaintiff not to do so. He now sued to have the buildings demolished and to recover the land. The value of the land sought to be recovered fell under the jurisdiction of the Munsif in whose Court the suit was brought, but the value of the buildings sought to be demolished exceeded his jurisdiction. Among other pleas the defendant contended that the Munsif had no jurisdiction to try the case. The Munsif, and on appeal the District Judge, held that the suit was within the jurisdiction of the Munsif's Court as the buildings did not in any way form the subject-matter of the suit. Both the Courts therefore decreed the plaintiff's suit and ordered the defendant to remove the buildings at his own cost. The defendant then preferred a second appeal to the High Court.

C. R. Pattabhirama Aiyar and *M. C. Parthasarathy Aiyangar* for appellants.

T. Jivaji and *R. Kuppusami Aiyar* for respondents.

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* S. A. No. 914 of 1895. 28th October 1896.

Ramasami v. Gundappa.

The Court delivered the following

JUDGMENT :—The appellant built upon the land found to be the respondents' property in spite of a notice from the latter objecting to the erection of the building. Under these circumstances the appellant cannot be allowed to rely upon the lapse of time before the institution of the suit in which possession founded upon his title was sought.

As to the objection that the Munsif had no jurisdiction, it is to be observed that the buildings did not form part of the subject-matter of the suit. The Munsif had therefore jurisdiction to try the case.

The second appeal fails and is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Subrahmania Aiyar and Mr. Justice Boddam.

Chinnasami Aiyangar ... ... Appellant * (*1st Deft.*)

Kuppusami Aiyangar ... ... Respondent (*Plaintiff.*)

Chinnasami Aiyangar v. Kuppusami Aiyangar.

Mortgage with possession—Invalidity of—Suit for possession—Relief *ejusdem generis*—Decree for money inconsistent.

A mortgagee who had been dispossessed of the mortgaged premises by the mortgagors sued them for possession of the same, and for an injunction restraining them from interfering with his possession and for such other relief as the Court may deem fit. It was found in the course of the trial that the mortgage was invalid:

Held, that the only relief the plaintiff was entitled to in the action by virtue of his prayer for other relief was relief *ejusdem generis* with his claim for possession and, consequently, that the plaintif was not entitled to a decree for the recovery of the mortgage money from the defendant.

Second Appeal against the decree of the District Court of Salem in A. S. No. 149 of 1894 confirming the decree of the Court of the District Munsif of Namakal in O. S. No. 364 of 1893.

In 1880, first defendant's father and another mortgaged land called "Temple garden" and their house to plaintiff for Rs. 350. The deed (A) recited that in lieu of interest plaintiff should enjoy the garden (but not the house) and that the money was repayable

* S. A. No. 915 of 1895. 27th September 1896.

Chinnasami Aiyangar v. Kuppusami Aiyangar.

by the mortgagors within the 12th March 1886. Plaintiff then enjoyed the land. The mortgagors died, and were succeeded by first defendant and a nephew of the other mortgagor. These men got possession of the temple land mortgaged to plaintiff. Accordingly in 1893 plaintiff sued them for possession and damages and such other relief as the Court might think proper to grant.

The defendants pleaded *inter alia*, that the temple garden should never have been mortgaged with possession as it was property of the temple; that the object of such mortgage was to benefit the mortgagors and not the temple.

The District Munsif found that the land being temple property, the mortgage thereof for purposes personal to the mortgagors was illegal; but that under the general prayer in the plaint, plaintiff was entitled to get a decree for his money. He accordingly decreed to plaintiff Rs. 350 from the assets of 1st defendant's father with interest from date of suit.

The first defendant thereon appealed to the District Court and the District Judge confirmed the Munsif's decree. The first defendant then preferred this second appeal to the High Court against the decree of the District Judge.

P. R. Sundra Aiyar for appellant.

M. E. Srirangachariar for respondent.

The Court delivered the following

JUDGMENT :—The plaintiff has made no claim for the mortgage money, but only for the possession of the land, and for an injunction, and, in fact, his claim is inconsistent with any claim for money. The only relief he was entitled to in such an action was relief *ejusdem generis* with his claim.

In the absence of any claim for money, the plaintiff was not entitled to a judgment for the mortgage money.

We, therefore, set aside the decree in both the lower courts and dismiss the suit. Each party must pay his own costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Arthur J. H. Collins, *Kt.*, Chief Justice, Mr. Justice Shephard, Mr. Justice Subrahmania Aiyar, and Mr. Justice Davies.

Khadar Hussain ... ... Appellant * (*Plaintiff.*)

Muhammad Hussain Sahib and another. } Respondents (*Defendants.*)

Khadar Hussain *v.* Muhammad Hussain Sahib.

Limitation Act, XV of 1877, Sch. II, Art. 12 (*a*)—Suit to recover property by person not party to the sale-proceeds.

Art. 12 (*a*) of Sch. II of the Limitation Act has no application to cases in which dispossession is the cause of action alleged and the plaintiff in which was not a party to, or bound by, the previous sale.

Suryanna v. *Durgi*, I. L. R., 7 M., 258, overruled.

Second appeal against the decree of the District Judge of Vizagapatam in A. S. No. 299 of 1893 reversing the decree of the District Munsif of Razam in O. S. No. 4 of 1893.

This second appeal coming on for hearing before their Lordships The Chief Justice and Mr. Justice Parker, their Lordships made the following.

Order of reference to the Full Bench.

The following are the facts which give rise to this reference :—

Plaintiff's paternal uncle, Dada Miyya, owned half an inam land, and plaintiffs' father owned the other half. Dada Miyya mortgaged his half to defendant's father in 1870. Defendants.' father obtained a decree upon this mortgage in suit No. 290 of 1878, and the property mortgaged was ordered to be sold. The sale took place in November 1881, but by some mistake the whole land was sold, instead of Dada Miyya's half share. Defendants' father purchased the land and was put in possession. Plaintiff brought this suit on November 25th, 1892, to recover possession of his half share.

The District Judge on the strength of the ruling *Suryanna* v *Durgi* I. L. R., 7 M., 258, held that the suit was governed by Article 12 (*a*) of the Limitation Act, and that the suit was barred.

There are, however, various decisions in which it has been held that Article 12 of the Limitation Act does not apply to suits in which

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* S. A. No. 62 of 1895. 2nd October 1896.

Kadar Hussain v. Muhammad Hussain Sahib.

the plaintiff was not a party to, and not bound by, the sale sought to be set aside. See *Sadagopa* v. *Jamuna Bhai*, I. L. R., 5 M., 54; *Haji* v. *Athmaraman*, I. L. R., 7 M., 512 (which was a decision by the same Bench); *Nilakandan* v. *Thandamma*, I. L. R., 9 M., 460; and *Parekh Ranchor* v. *Bai Vakhat*, I. L. R., 11 B., 119; and *Vishnu Keshav* v. *Ramachandra Bhaskar*, I. L. R., 11 B., 130.

The ground of decision appears to be that Article 12 is inapplicable to suits in which dispossession is the cause of action, since dispossession may not have taken place till some time after the confirmation of the sale.

The decision in *Suryanna* v. *Durgi*, I.L. R., 7 M., 258, has been recently doubted by a Bench of this Court in S. A. No. 1298 of 1894.

The question referred to the Full Bench is whether Article 12 (*a*) of the second schedule of the Limitation Act is applicable to a case in which dispossession is the cause of action and in which plaintiff was not a party to, or bound by, the sale.

R. Subrahmania Aiyar for appellant.

R. Ranga Rao for *C. Ramachandra Rao Sahib* for respondents.

The Full Bench expressed the following

OPINION:—In the circumstances stated we think there can be no doubt that Article 12 (*a*) of the Limitation Act cannot properly be applied to the suit brought by the plaintiff.

Whatever was the intention of the parties who took part in the execution sale, that transaction could not affect the title of the plaintiff, and therefore it was not necessary for him to have the sale set aside.

We cannot agree with the decision in *Suryanna* v. *Durgi*, I. L. R., 7 M., 258, which was also a case of a sale in execution of a decree.

[In accordance with the opinion expressed by the Full Bench, the Division Bench (The Chief Justice and Mr. Justice Benson) set aside the decree of the lower appellate Court and remanded the appeal for disposal in accordance with law.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Wilkinson and Mr. Justice Shephard.

Venkatarazu ... ... Appellant (*1st Defendant.*) *

v.

Narayanamurty ... ... Respondent (*Plaintiff.*)

Venkatarazu *v.* Narayanamurty.

Limitation—Adverse possession—Kurnam service—Inam.

Certain lands were attached as inam to the office of Kurnam in a zemindari village. There were two Kurnams for the village, and about the beginning of this century, the inam was divided equally and held separately by the two working Kurnams for the time being; and after them the lands were in the possession and enjoyment of their descendants who were also doing the service. The last working Kurnam in one of the branches died in 1844, and since then the lands have been held by his descendants as private property without being attached to any service. Neither the Zemindar nor the descendants of the other branch made any attempt either to fill the vacancy caused in 1844, or to re-attach the lands to the office.

Held:—That the possession of the lands became adverse both to the Zemindar and to the co-kurnam and his descendants.

Second appeal against the decree of the Subordinate Court of Cocanada in A. S. No. 58 of 1887, confirming the decree of the Court of the District Munsiff of Cocanada in O. S. No. 287 of 1886.

This was a suit for division and delivery to the plaintiff of one half of the plaint properties in the possession of the first defendant. The properties in question and other properties were originally granted as mirasi inam attached to the office of Kurnam of the village of Kudupoor. The first holder of the office was one Venkiah, the common ancestor of both the plaintiff and the first defendant. At the commencement of the present century the duties of the office of Kurnam of the village above mentioned came to be discharged by two registered Kurnams—Timmarazu and Nagarazu,—both of them being descendants of Venkiah. The inams attached to the office were also divided and held in shares by the two working Kurnams. Later on the office duties were being performed by the representatives of each of these branches and the share of the inam lands attached to each branch descended and was held by the working

* S. A. No. 65 of 1888. 28th February 1889.

Kurnam for the time being for the benefit of his branch, and the lands so held being divided and held possession of by the various members of the branch. The plaintiff and the first defendant are the descendants of Timmarazu. The last working Kurnam in the line of Nagarazu was one Bhadriah, who died in 1844. After Bhadriah's death, his place was left unfilled and was marked vacant in the Revenue Account of 1844. The proprietor of the estate did not choose to appoint a successor to Bhadriah, nor did he attach the emoluments of the office held by Bhadriah to the office of the other working Kurnam whose descendants were the present plaintiff and the first defendant. Consequently, the plaint properties, which were in the possession of Bhadriah at the time of his death in 1844, were held by his descendants after him without their doing any service whatever. The last holder in that branch was one Subbannah, who died in 1878. The plaintiff's case was that, after the death of Subbannah, the property was equally divisible between him and the first defendant as the heirs of Subbannah, but that the first defendant had unlawfully taken possession of the whole of the lands and refused to give plaintiff his share. The first defendant on the other hand contended that the lands were service inams attached to the office of Kurnam held by him and were indivisible. The Courts below held that the service tenure of the lands in question had been extinguished by long adverse possession of Bhadriah's descendants without doing any service and decreed the plaintiff's suit. The first defendant thereon preferred this second appeal to the High Court. The second defendant was made party to the suit as she was the proprietrix of the estate.

C. R. Pattabhirama Aiyar for appellant.

T. Subba Rao for respondent.

The Court delivered the following.

JUDGMENT:—It has been found that up to the death of Bhadriah in 1844 there were two Kurnams, and the land in suit had been enjoyed by Bhadriah and his predecessors. The lands set

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

ORIGINAL CIVIL.

Present:—Mr. Justice Shephard.

In re: The Royapuram Church Case.

In re: The Royapuram Church Case.

Advocate-General—Qualifications—Appoint, power to—Local Government—Ss. 29, 30 of 21 and 22 Vic. Ch. 106.

Whenever the office of the Advocate-General of any province falls vacant, the Local Government of that province has power to make a temporary appointment to that office. In the making of such appointment the Government is not under any restriction to limit its choice to the class of barristers. The Local Government may appoint a vakil to the office.

E. B. Powell rose to move on behalf of the Advocate-General for directions as regards repairs.

Brown objected to the motion on the ground that there was no legally appointed Advocate-General on whose behalf the motion could be made. He said:—My point is that the appointments mentioned in S. 30 of 21 and 22 Vic. Chapter 106 are not the appointments mentioned in S. 29. S. 30 refers to a class of appointments altogether different from those mentioned in S. 29. The Local Government cannot make the appointment.

Norton.—In Bombay, custom has validated the appointment.

Brown.—When the question arose as to the power in India for making acting appointments, the Legislature passed Act XVI of 1867 (Indian). As far as statute law is concerned, there appears to be no provision under which the Local Government can act in making this appointment. The question is whether, by custom or by anything apart from statute law, such authority is given to the Local Government. The Advocate-General is appointed by Her Majesty. *Mr. Justice Norman* refers the appointment of Officiating Advocate-General to S. 29. It was in that case conceded that the acting office is conferred by the Viceroy as representing the Crown. We may take it that the Viceroy has rather further powers as representing Her Majesty than the Governor of any of the minor provinces. It is conceded that the appointment of the Acting Advocate-General has a local origin with reference to S. 30. Then the question arises as to whether the appointment of the present Advocate-General is valid. It may be treated as a matter without dispute that up to the date of this statute of 1858 the conditions, qualifications and restrictions affecting the appointment of Acting Advocate-

In re: The Royapuram Church Case.

General were conditions, qualifications and restrictions with reference to the appointee's position in the Legal Profession. There has been, so far as I am aware, no case where such a qualification and condition have not been complied with. On that ground I submit that, even if the appointment is one which the Local Government has power to make apart from my learned friend's status in the Legal Profession and apart from his qualification, the question arises whether the circumstance that my learned friend is not a member of the Bar, etc. . . . . is a circumstance which prevents the appointment, supposing it is otherwise a valid appointment.

Norton here read an extract from a newspaper being a report of certain proceedings in Bombay relating to the appointment of Advocate-General, dated 6th October 1865. He said the conclusion there come to was that the Acting Advocate-General had no right of pre-audience at the Bar. With regard to the suggestion that no one excepting a Barrister can be appointed to the office of Advocate-General, a custom which really has now acquired the force of law has grown up from the time of the first appointment of Advocate-General until to-day, unbroken and recognised, to appoint to the Advocate-Generalship only a Barrister. The appointment of any person who does not answer to the definition of S. 30 of the Act and is not qualified under the limitations, restrictions and conditions of S. 30, is a person on whom Government are not entitled by law to confer the appointment of Advocate-General. We are supported in the view that we take of the present appointment by the Bengal and Bombay Bar.

Powell.—Although the objection to the validity of the appointment of Advocate-General might possibly be taken in a proper proceeding, yet in a proceeding of this kind where he is only nominally a party when he is *de facto* the Advocate-General, whether he is *de jure* so or not, it is sufficient for the purposes of this proceeding. The suit is brought, no doubt, by the Advocate-General; but what I am asking the Court on the representation of this matter which is before the court already, is, while under the decree of Sir Charles Turner the parties are invited to come in and see that the desire is properly carried out, the Court itself might on the representation of any party carry it out. It is merely a question of repairs, and of course if these are not executed expeditiously, the whole property suffers.

JUDGMENT:—*Shephard, J.*—It is not necessary to enquire whether the gentleman who holds the appointment of Advocate-General is legally competent to do so. I agree with Mr. Powell that the *de facto* Advocate-General may make this application.

In re: The Royapuram Church Case.

Both objections must however fail.

The authorities cited both by Mr. Brown and by Mr. Norton are against the contention that legally Government has no power to make a temporary appointment.

As to the other question, it is suggested that, inasmuch as the statute requires that the appointment should be made subject to the qualifications, conditions and restrictions now affecting such appointment, that provision is not complied with. This is the first occasion on which a gentleman who is not a Barrister or Advocate of Scotland has been appointed to the office. I am unable to say that it can be properly inferred from that circumstance that there is any such restriction upon the appointment to the office as is contended for. I must therefore overrule this objection.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Boddam.

Appa Rao ... ... Appellant* (*Plaintiff*).

v.

Rameswara Rao and another ... Respondents (*Defendants*).

Appa Rao *v.* Rameswara Rao.

Landlord and tenant—Relinquishment for consideration—Madras Rent Recovery Act VIII of 1865, S. 12—Registration Act III of 1877, S. 17, cl. (*b*).

Where a tenant relinquished his holding by an unregistered document in writing in favor of his landlord in consideration of the latter agreeing to give up his claims to arrears of rent due to him to the extent of six-hundred rupees,

Held, in a suit by the landlord to eject the tenant, that the document in question was not a mere relinquishment as is contemplated by S. 12 of the Rent Recovery Act, but was one falling under cl. (*b*) of S. 17, Registration Act, and was consequently inadmissible in evidence being unregistered.

Second appeal against the decree of the District Court of Kistna in A. S. No. 1567 of 1893, confirming the decree of the Court of the District Munsif of Gudivada in O. S. No. 160 of 1892.

This was a suit to declare the plaintiff's right to certain lands and for recovery of possession from defendants 1 and 2. The first defendant was a tenant of the plaintiff and, having fallen in

* S. A. No. 690 of 1895. 24th November 1896.

Appa Row v. Rameswara Rao.

arrears in the payment of rent, agreed to relinquish his holding in favor of his landlord, the plaintiff, by an unregisteted document in writing which ran as follows:—

"Being unable to cultivate and pay off arrears of rent, I have put in relinquishment of the lands which I have been cultivating at Gurazada, dry 16 acres 85 cents, wet 7 acres 87 cents, total 24 acres 72 cents. I have agreed to have the land removed from my name in the village accounts from fasli 1298, and to your doing as you like (with the land) without (any) concern on my part for the 600 rupees due on it. This is the relinquishment report which I have written and filed with my consent."

After the relinquishment, the tenant nominally executed a mortgage of his holding in favor of the second defendant and collusively allowed a decree to be passed against him in favor of the second defendant who then took out execution, purchased the first defendant's interest in the property and got into possession of it. The plaintiff now sued them both to recover possession and based his claim on the relinquishment made by the first defendant. The Munsif held that the alleged deed of relinquishment fell under cl. (*b*) of S. 17 of the Registration Act and was inadmissible in evidence for want of registration and, as there was no other proof of relinquishment, dismissed the plaintiff's suit. On appeal the District Judge confirmed the Munsif's decree. The plaintiff thereon preferred this second appeal to the High Court.

S. R. Ramasubba Aiyar and *P. R. Sundara Aiyar* for appellant.

C. R. Pattabhirama Aiyar for respondent.

The Court delivered the following

JUDGMENT:—If the document in question was nothing more than a mere relinquishment presented by a tenant, the first defendant, to his landlord, the plaintiff, under S. 12 of Act VIII of 1865 which authorises the former to relinquish his holding at the end of any revenue year, by a writing signed in the presence of witnesses irrespective of the landlord in the matter, there can be no doubt that the document did not require to be registered under S. 17 of the Indian Registration Act. But that the document was one given for a consideration which moved from the plaintiff to the first defendant, *viz.*, the waiver by the former of his right to the

Appa Row v. Rameswara Rao.

arrears of rent amounting to Rs. 600 due at the time of the relinquishment, is clear from the terms of the instrument itself. It is true that the passage in the plaint, upon which stress was laid on behalf of the plaintiff, suggests that the paper in question had been delivered to the servants of the plaintiff before he signified his consent to forego his claim to the 600 rupees. But neither the fact that the plaintiff accepted the first defendant's offer only after the paper which was to operate as evidence of the relinquishment had been put into the hands of his servant, nor the circumstance that the acceptance was not in writing, is at all material. The moment the offer was accepted, the paper which had been parted with by the first defendant, conditionally as it were, became fully operative between the parties to the arrangement and extinguished the interest which the first defendant had as a tenant. Therefore, the conclusion of the lower Courts that the relinquishment was not a mere abandonment under S. 12 of the Rent Recovery Act by the first defendant of his right to occupy the land, but a contract between him and the plaintiff, which fell within S. 17 of the Registration Act, and which was, therefore, inadmissible for want of registration, appears to be correct.

The second appeal fails and is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Davies.

Chintamallayya ... Appellant* (*Plaintiff*).

v.

Thadi Gangireddi ... Respondent (*Defendant*).

Chintamallayya v. Thadi Gangireddi.

Arbitration—Private award—Award ante-dated—Misconduct of arbitrator—Civil Procedure Code, Ss. 520, 521, 522 and 525.

Where an application is made to a court under S. 525, Civil Procedure Code, to file a private award, the Court filing the award has jurisdiction to inquire into the genuineness of the award; and where an objection is raised to the filing on the ground that the award was made after a notice of revocation of the submission had been served on the arbitrators and was perversely antedated by them, the Court has power to go into the matter and decide it finally. If such an objection is considered

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* A. No. 199 of 1895. 2nd December 1896.

Chintamallayya v. Thadi Gangireddi.

and disallowed and a decree passed in accordance with the award, no subsequent suit will lie in which the same matter can be re-agitated.

Micharaya v. *Sadasiva Paramа*, I. L. R., 4 M., 319, and *Amrit Ram* v. *Dasrat Ram*, I. L. R., 17 A., 21, followed.

Appeal against the decree of the Subordinate Judge's Court of Cocanada in O. S. No. 40 of 1894.

Plaintiff sued for a declaratory decree setting aside the decree in O. S. No. 23 of 1893 to which he was a party and cancelling on the ground of fraud an award of certain arbitrators which had been ordered by that decree to be filed in Court. Plaintiff and defendant were carrying on business in partnership in grain, jaggery, &c., till the 29th July 1892, when, certain differences arising between them, they dissolved the partnership and referred their disputes to certain arbitrators for their decision. The arbitrators to whom the reference was made gave their award on the 1st February 1893. The defendant in the present suit then filed an application under S. 525, Civil Procedure Code, to have the award filed and a decree passed in accordance with it. The application was filed and numbered as O. S. No. 23 of 1893, and notice was sent in it to the present plaintiff who opposed that suit on various grounds, such as corruption, fraud, &c., on the part of the arbitrators. Among other objections to the award, he alleged that the award was actually made on the 17th February 1893, that he had sent a notice of revocation of the submission to the arbitrators before they made the award, but that they perversely antedated it making it appear that it had been made on the 1st February 1893, *i.e.*, before they received the notice. All these objections were then considered by the Court and disallowed, and a decree was passed in accordance with the award. The plaintiff now prayed in the present suit to set aside that decree and the award on precisely the same grounds that he had alleged in the previous suit. But at the hearing of the case the plaintiff's pleader restricted himself to the objection that the award was perversely antedated by the arbitrators and contended that that was not a matter which a Court filing an award under S. 525 could have gone into and decided. The Sub-Judge, however, decided otherwise and dismissed the plaintiff's suit.

He followed the ruling in *Micharaya* v. *Sadasiva Parama*, I. L. R., 4 M., 319, and thus applied it to the facts of the present case.

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"Applying it then to the present case, can it be said that the allegation about the antedating of the award was not a question which the Court would deal with in the application filed as suit No. 23 of 1893? I think the Court had jurisdiction to try and decide the point. The date given to a document is as much a part of the document as the signatures thereto, and the question whether an award was genuine would include the point whether it was truly dated, quite as much as the point whether it was truly signed by the arbitrators. The decision, therefore, given by this Court to the effect that the award bore the true date is not *ultra vires*.

I may also observe that, if the arbitrators antedated the award, such act of theirs was surely one coming under the term misconduct, and, therefore, the question whether they were guilty of such misconduct or not, was one coming within the purview of S. 521, and, therefore also, the decision of this Court that there was no antedating is not *ultra vires*."

The plaintiff then preferred this appeal to the High Court.

V. Krishnaswami Aiyar for appellant.

Ramachandra Rau Saheb and *N. Subba Rau* for respondent.

The Court delivered the following

JUDGMENT:—The argument is that the Subordinate Judge had no jurisdiction to enquire into the grounds or validity of the award apart from such grounds as would fall under Ss. 520 and 521 of the Code of Civil Procedure, his authority being limited under S. 526 to the matters mentioned in those two sections.

It is true that different views of this matter have been taken by the different High Courts. In our opinion, the correct view is that held by the Full Bench of the Allahabad High Court in *Amrit Ram* v. *Dasrat Ram*, I. L. R., 17 A., 21. It is also in accordance with an opinion expressed by this Court so far back as 1881, in *Micharaya* v. *Sadasiva Parama*, I. L. R., 4 M., 319, which we believe has always been acted on. The weight due to that opinion and practice is not lessened by the fact that the decision in that case, so far as it relates to the right of appeal, has since been overruled in *Husanannna* v. *Linganna*, I. L. R., 18 M., 423. No doubt, *Parker, J.*, has in this case expressed himself as inclined to take a different view, but we, however, are unable to do so.

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The objection that the Subordinate Judge had no jurisdiction, therefore, fails and this decision in the previous case must be held to be binding in the present suit.

The appeal fails and is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Boddam.

Ganapathy Nayakar ... ... *Petitioner* *

v.

Saminadha Pillai ... ... *Respondent.*

Ganapathy Nayakar v. Saminadha Pillai.

Suit on a pro-note—Suit by benamidar unsustainable—Negotiable Instruments Act, Ss. 32, 50, 120, 121.

The payee of a pro-note was found to be benamidar for a third person in respect of the amount of the pro-note. In a suit by such a payee against the drawer for the recovery of the amount due under the note,

Held: that the payee being only a benamidar cannot sue on the note in his own name.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Subordinate Judge's Court of Kumbakonam in Small Cause suit No. 36 of 1895.

Plaintiff sued on a pro-note for Rs. 200 executed in his favour on the 14th January 1892 and made payable to him or to his order. The defendant alleged that there was no consideration for the note, that one, S, who was in reduced circumstances and much pressed by his creditors on all sides, obtained a lease of some lands for cultivation of plantain trees, and fearing that, if the lease stood in his name his creditors may attach it, he made it stand in the name of the defendants and that as a matter of security for the defendant's honor and undeceiving conduct towards the said, S, this pro-note had been executed in plaintiff's name. The Sub-Judge passed the following judgment in the case:—

"The points for determination are—

Whether the plaintiff is the owner of the pro-notes sued on or whether they were executed under circumstances alleged by defendant.

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* C. R. P. No. 578 of 1895. 2nd November 1896.

Having heard all the witnesses examined on the matter, I am of opinion that Srinivasa Naickan procured the pro-notes from the defendant in plaintiff's name and that the plaintiff is not the owner of the same and that plaintiff has no right to maintain this suit upon them.

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This suit is dismissed with costs and defendant's vakil's fee."

The plaintiff then preferred this revised petition under S. 25 of Act IX of 1887.

M. Krishnamachariar for petitioner.

P. R. Sundara Aiyar for respondent.

The Court delivered the following

JUDGMENT:—It has been laid down in many cases in this Court that whether on a bond, mortgage or other contract a benamidar cannot sue in his own name.

In this case, the plaintiff whose name appears in the pro-note as payee has been found to be the benamidar for another and, therefore, in an action brought by him against the drawer of the note, the Court below has dismissed the suit holding that the plaintiff cannot sue.

We think this decision is right, for we are unable to distinguish this case in principle from those mentioned above, in which this Court has held that a benamidar cannot sue in his own name.

Sections 32, 50, 120 and 121 of the Negotiable Instruments Act relied on by the petitioner have no real bearing upon the present question.

The petition is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur Collins, *Kt.*, Chief Justice, and Mr. Justice Benson.

Kommachi Kather ... ... Appellant * (*Plaintiff*).

v.

Pakker and others ... ... Respondents (*Defendants*).

Kommachi Kather *v.* Pakker.

Civil Procedure Code, S. 295—Decree for money—Rateable distribution—Mortgage decree, nature of—Right of mortgagee decreeholder to proceed personally against judgment-debtor in the first instance.

Every decree by virtue of which money is payable to the decreeholder is to that extent a "decree for money" within the meaning of S. 295 of the Civil Procedure Code.

A mortgagee who obtains a decree on his mortgage to the effect "that the defendant do pay plaintiff within two months from this date Rs. 2,500, and that, in default, plaintiff do recover the same by sale of the mortgaged property, and the balance, if any, from the defendant" is a holder of a money decree and is entitled to come in for rateable distribution under S. 295 before first realizing as much as he can of his decree-amount by sale of the mortgaged property.

Harat v. *Tara Prasanna Mukerji*, I. L. R., 11 C., 718, followed.

Ram Charan Bhagat v. *Sheobarat Rai*, I. L. R., 16 A., 418, dissented from.

Second appeal against the decree of the District Court of North Arcot in A. S. No. 445 of 1894, confirming the decree of the Court of the District Munsif of Taliparamba in O. S. No. 199 of 1894.

The plaintiff was the mortgagee of eight items of real property under one K. V. Chintan and his anandravans. The first defendant held a subsequent mortgage on two or three items of the same properties. The first defendant obtained a decree against the mortgagor and plaintiff in O. S. No. 76 of 1893 for the recovery of his mortgage amount by sale of the properties mortgaged to him and also personally from the mortgagors and the decree provided that in default of the defendants paying within two months, the mortgaged properties should be sold subject to the prior claim of the plaintiff, and that if the sale-proceeds should be insufficient the balance should be paid by the mortgagors personally. The plaintiff subsequently obtained a decree against the mortgagors in a suit to which the first defendant was a party for the mortgage amount and the terms of the decree were similar to the terms of the decree obtained by the first defendant and ran as follows:—"Defendants do pay plaintiff within two months from this date

* S. A. 819 of 1895, 20th November 1896.

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Rs. 2,500 . . . . ., and in default, plaintiff do recover the same by sale of the plaint properties and the balance, if any, from the defendants." Then the first defendant gave up his claim against the items mortgaged to him and attached and sold other lands of the mortgagors for Rs. 1,337, and the sale-proceeds were set-off against the first defendant's decree amount. But one or two months before the sale the plaintiff applied for the sale of the properties mortgaged to him and for attachment of other properties of the mortgagors. The latter request was not granted. The sale of the mortgaged lands was postponed at the request of the mortgagors. Then the plaintiff applied to the Court under S. 295, Civil Procedure Code, for rateable distribution of the sale-proceeds realized in execution of the first defendant's decree. His application was rejected on the ground that he had then no decree capable of execution. The plaintiff's appeal against that order was also rejected. The properties mortgaged to the plaintiff were afterwards sold and the sale-proceeds was found to be insufficient. The plaintiff then applied again for a rateable distribution and got Rs. 2,500. The plaintiff, thereupon, brought the present suit to recover Rs. 426-15-0, alleging that he was entitled to get the same when he first applied. The first defendant contended that the suit was irregular and not cognizable by the Court and that the plaintiff was barred by the former order in execution proceedings and that the plaintiff was not entitled to rateable distribution of the sale-proceeds under S. 295. The District Munsif dismissed the suit on the ground that the plaintiff had no decree capable of execution at the time of the sale in execution of the first defendant's decree. The plaintiff appealed to the District Judge, and he confirmed the Munsif's decree, holding that the plaintiff had no money decree within the meaning of S. 295, Civil Procedure Code, and that S. 295, *c*, barred plaintiff's application. The plaintiff thereupon preferred this second appeal to the High Court.

V. Ryru Nambiar for appellant.

K. P. Sankara Menon for respondent.

The Court delivered the following

JUDGMENT:—The facts of the case are correctly stated in paragraph 8 of the District Munsif's judgment.

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The District Munsif, assuming that the plaintiff had a "decree for money" within the meaning of S. 295, Civil Procedure Code, still dismissed the suit on the ground that it was incapable of execution, except as against the mortgaged property at the time when the plaint property was sold at the instance of the first defendant.

The District Judge confirmed the District Munsif's decree for two reasons: firstly, because S. 295 (c) in his opinion barred the plaintiff's decree, and, secondly, because the plaintiff's decree was not "a decree for money" within the meaning of S. 295, Civil Procedure Code.

The plaintiff appeals and we think with good reason. The District Judge is manifestly in error in supposing that clause (c) of S. 295 governs the case. That clause refers only to property sold "in execution of a decree ordering its sale for the discharge of an encumbrance thereon." In the present case the property sold by first defendant was not encumbered property, but other property of the judgment-debtor.

The plaintiff and defendant had respectively a first and a second mortgage over other property of the same mortgagor, but neither of them held any encumbrance on the property sold by first defendant. It seems to us that the plaintiff and first defendant were in exactly the same position with regard to this property and each was equally entitled to a rateable share of the sale-proceeds.

The District Judge is, in our opinion, wrong in holding that the present decree is not "a decree for money" within the meaning of S. 295, Civil Procedure Code. No doubt, his view is supported by the language used in *Ram Charan Bhagat* v. *Sheobarat Rai*, I. L. R., 16 A., 418, but the opposite view was held by the Calcutta High Court in *Hart* v. *Tara Prasanna Mukkerji*, I. L. R., 11 C., 718. The exact terms of the decree in the Allahabad case are not reported, nor is the Calcutta case referred to therein; but in our opinion the law is correctly stated in the latter case.

The decree before us runs as follows:—"That the defendants "do pay plaintiff within two months from this date Rs. 2,500 with "interest and costs and that, in default, plaintiff do recover the "same by sale of the plaint property, and the balance, if any, from "first to sixth defendants." It seems to us that this is a decree for

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money, and that it does not lose this character, because the decree declares the mode and the order of the procedure by which it is to be realized.

The first paragraph of S. 295 runs as follows:—" Whenever " assets are realized by sale or otherwise in execution of a decree, " and more persons than one have, prior to the realization, applied " to the Court by which such assests are held for execution of decrees " for money against the same judgment-debtor, and have not ob- " tained satisfaction thereof, the assets, after deducting the costs of " the realization, shall be divided rateably among all such " persons."

It is under this paragraph that the plaintiff claims the right to a rateable share of the property. Formerly, the creditor who first attached property had a prior claim to have his decree satisfied out of the sale-proceeds to the exclusion of other creditors, but now all judgment-creditors who apply to the Court, prior to realization, are entitled to share rateably, and under the penultimate paragraph of the section, if any of such assets be wrongly paid to any person, a judgment-creditor entitled to a rateable share may sue to recover the same from the person wrongly paid. It is under this paragraph that the plaintiff brings his suit. In the words of the Calcutta case already referred to—" The object of the section appears to us to be to provide for the rateable distribution of the assets of a judgment-debtor among all persons who have obtained decrees ordering the payment of money to them from the judgment-debtors and the fact that a person who has obtained such a decree also holds security or is entitled to any other relief under the decree, is immaterial. There is, therefore, we think, nothing in the section which takes away the right of a mortgagee, who has obtained a decree upon his mortgage, to proceed in the same suit against property of the mortgagor not subject to the mortgage when there are other creditors—nothing which shows that the only persons entitled to share rateably in the proceeds of sale of property sold in execution of a decree are those who have obtained decrees for money only. We think, therefore, that every decree, by virtue of which money is payable, is to that extent a " decree for money " within the meaning of the section, even though other relief may be granted by the decree; and that the holder of such a decree is entitled to claim rateable distribution with holders of decrees for money only.

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If it were held otherwise, it would often result that the insufficiently-secured creditor might find himself worse off than the wholly-unsecured but more prompt and pressing creditor, and an inducement would exist for that scramble for first attachment which the recent alterations of the law were designed to remove. The unsecured creditor is not placed at an unfair disadvantage, since he advanced his money on the faith of the debtor's general credit apart from the property mortgaged, and it is always open to such a creditor to compel the sale of mortgaged property if it is likely to yield any surplus over and above the mortgaged money.

It remains to consider the ground on which the District Munsif dismissed the suit, *viz.*, that the plaintiff's decree was incapable of execution against anything save the mortgaged property, at the time when the first defendant attached the other property. It is true that at that time the plaintiff was not in a position to immediately execute his decree, but neither was the first defendant, for the decree in favour of the latter was subject to precisely the same limitation as the plaintiff's decree. The property ought not, therefore, to have been sold and the money paid to the first defendant until the mortgaged property had been sold and had been found to be insufficient to pay his debt. His title to receive payment out of the property sold did not arise until the mortgaged property was found to be insufficient, and the plaintiff's title arose at precisely the same time. The payment of the whole of the sale-proceeds to the first defendant was, therefore, wrong, as the plaintiff was entitled to a rateable share.

In this view, we must set aside the decree of the Courts below and give judgment for plaintiff as sued for with costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Subrahmania Aiyar and Mr. Justice Davies.

Krishnaswami Aiyangar .... Appellant * (*Plaintiff*).

v.

Runga Aiyangar ... . Respondent (1*st Deft.*)

Krishnaswami Aiyangar *v.* Runga Aiyangar.

Civil Procedure Code, Ss. 258, 241—Adjustment after decree in execution proceedings—Adjustment not certified—Separate suit for damages for breach of agreement.

A decree-holder applied for execution of his decree and the judgment-debtor pleaded that the parties had come to some adjustment; the Court gave the parties a week's time to compromise. At the end of the week the Court allowed execution to proceed as it thought that the parties would not compromise. No application was made under S. 258 to certify any adjustment and the Court had no occasion to decide whether the parties had or had not come to any particular agreement. The present suit was brought by the judgment-debtor for recovery of properties given him under an alleged compromise made by the parties before the passing of the above mentioned order in execution and for damages.

Held : That the suit with respect to the recovery of properties which the defendant had taken possession of in execution of the previous decree was *res judicata* and that the plaintiff's suit for damages for breach of the alleged agreement was barred by S. 244.

Subbakka v. *Viraraghava Reddi*, I. L. R., 5 M., 397, and *Mallamma* v. *Venkappa*, I. L. R., 8 M., 277, followed. *Guruvayya* v. *Vudayappa*, I L. R., 18 M., 26, distinguished.

Appeal against the decree of the Subordinate Judge's Court of Kumbakonam in O. S. No. 56 of 1893.

The defendant got a decree against the plaintiff in O. S. No. 22 of 1884 in the Sub-Court of Kumbakonam for partition and delivery to him of ⅓ of the entire properties of the family consisting of both the plaintiff and defendant and some others. Pending the execution proceedings of that decree the plaintiff put in an application for stay of execution on the ground that the parties had referred their disputes to some arbitrators, and that the award was almost ready and that they would soon file in Court the compromise that they may finally agree upon. The Court granted the parties a week's time to come to a final understanding and at the end of the week the Court, being of opinion that parties were still quarrelling and had not come to any definite understanding, allowed execution to pro-

* A. No. 229 of 1895. 4th December 1896.

Krishnaswami Aiyangar v. Runga-Aiyangar.

ceed at the instance of the decree-holder who was accordingly put in possession of the properties decreed to him. There was no application by either of the parties under S. 258 of the Civil Procedure Code and the Court had no occasion to decide whether there was or was not, in fact, any adjustment at all. The present suit was brought by the plaintiff to enforce the terms of the compromise that, he alleged, had been effected in the previous suit by the parties and for damages for breach of that compromise on the part of the defendant in not getting the compromise certified by the Court. The Subordinate Judge thought that this matter ought to have been raised in the execution proceedings in the previous suit and that no separate suit will lie and therefore dismissed the plaintiff's suit. The plaintiff thereon presented this appeal to the High Court.

C. Ramachandra Rau Saheb for appellant.

C. Sankara Nair and *V. Sankara Narayana Sastri* for respondent.

The Court delivered the following

JUDGMENT :—In so far as the plaintiff's claim is made for lands adjudged to the defendant in O. S. No. 22 of 1884, it is not sustainable in the face of that adjudication.

But as to the claim for damages for breach of the alleged agreement, the suit is not barred. (*Subbakka* v. *Viraragava Reddi,* I. L. R., 5 M., 397, and *Mallamma* v. *Venkappa,* I. L. R., 8 M., 277, respectively). If the Subordinate Judge in his orders in execution of the decree in the previous suit had decided that there was no agreement as alleged, that decision would no doubt have operated as a bar by *res judicata* to this suit which is based upon that agreement. We find, however, that there was no such decision. The agreement was set up simply for the purpose of staying execution until the arrangements under the agreement were ripe for being certified to the Court in adjustment of the decree. The Subordinate Judge proceeded with the execution of the decree not because he found that there was no agreement, but on the other hand because there were disputes as to the nature of the agreement. Neither party applied under S. 258 of the Code of Civil Procedure

to have an agreement certified, and there was no order under that section. The case of *Guravayya* v. *Vudayappa*, I. L. R., 18 M., 26, does not therefore apply. Krishnaswami Aiyangar v. Runga Aiyangar.

We must accordingly reverse the decree of the lower Court and remand the suit for trial according to law in so far as the claim for damages is concerned. The suit as a suit for delivery of lands is dismissed. Costs to abide and follow the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Davies and Mr. Justice Boddam.

Kuppusami Aiyar ... Appellant* (*Plaintiff.*)

v.

Subramania Aiyar and others... Respondents (*Defendants*).

Madras Revenue Recovery Act, II of 1864, S. 59—Suit to recover property sold for arrears of revenue—Revenue Sale—Relief on the ground of fraud—Limitation—Limitation Act, XV of 1877, Sch. II, Art. 95—Madras Forest Act, S. 90—Co-sharer's right to sue—Civil Procedure Code, S. 43. Kuppusami Aiyar v. Subramania Aiyar.

The limitation provided by Section 59 of the Madras Revenue Recovery Act is applicable only to those cases where the plaintiff seeks to set aside a sale on the ground of fraud and has no application to cases where he seeks for some relief arising out of the altered relations between himself and the defendant consequent on the fraud practised on him. Art. 95 of Sch. II of the Indian Limitation Act, XV of 1877, applies to such cases.

A mere co-owner of several properties is under no obligation to sue his co-sharers for division of all their joint properties in one suit when he wants the division of only one or some of them.

Second appeal against the decree of the Subordinate Judge's Court of Negapatam in A. S. No. 119 of 1894, reversing the decree of the Court of the District Munsif of Tiruvalur in O. S. No. 481 of 1892.

Plaintiff sued defendants for division and delivery to him of his share of two items of property in the possession of the defendants. The case alleged by the plaintiff was that both he and the 1st defendant were joint purchasers of these properties and were co-owners and the 1st defendant refused to divide and give him his share of the properties in dispute. The other defendants claimed

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* S. A. 690 of 1895. 24th November 1896.

Kuppusami Aiyar v. Subramania Aiyar.

to be in possession under the 1st defendant. With respect to the first of these items the defence raised was that it was sold for arrears of Government revenue and purchased by a third party, and that it was subsequently purchased from him by the 1st defendant. With regard to the second item the defendants contended that the plaintiff's suit was barred under section 43 of the Civil Procedure Code inasmuch as the plaintiff had formerly brought a suit for division of some other properties including the first item in this suit jointly held by him and the 1st defendant, and that in that suit he had failed to include this. In the former suit it had been decreed that, as item No. 1 in the present suit was then in the possession of lessees under a valid lease the plaintiff was to get possession of his share after the expiry of the lease term. As the defendant refused to deliver possession on the expiry of the lease the plaintiff brought this present suit for division and delivery of his share. The Munsif held with respect to the first item that the 1st defendant had fraudulently allowed the property to be sold for arrears of revenue and had purchased it for himself in the name of another and thus practised a gross fraud on the plaintiff and with respect to the second item he held that the plaintiff's suit was not barred by section 43 of the Civil Procedure Code. In the event he decreed the suit. On appeal the Sub-Judge reversed the decision of the Munsif and dismissed the plaintiff's suit. He held that the suit was barred by limitation with respect to item No. 1 and that with respect to item No. 2 it was barred by S. 43 of the Civil Procedure Code. He gave no finding, however, on the question of the fraud practised by the 1st defendant. The plaintiff then preferred this second appeal to the High Court and contended that in the circumstances the purchase by the 1st defendant of item No. 1 was for his benefit also under S. 90, Indian Trusts Act.

This second appeal coming on for hearing on Tuesday, the 21st day of July 1896, the Court delivered the following

Order and Part Judgment :—The Subordinate Judge has misunderstood the claim of the plaintiff as regards item No. 1. The plaintiff does not now seek to set aside the revenue sale, but to claim the benefit of it, under the principle laid down in section 90 of the Trust Act, owing to the 1st defendant's fraud. The Munsif found that there was fraud on 1st defendant's part, but the

Subordinate Judge has not considered the question. He will now try it on the evidence on record and submit his finding within six weeks from the date of the receipt of this order, and seven days will be allowed for filing objections after the finding has been posted up in this Court.

It was argued that the plaintiff was time barred from raising the question of fraud under section 59 of the Madras Revenue Recovery Act II of 1864, and the case of *Venkata* v. *Chengadu*, I. L. R., 12 M., 168. The section and ruling refer only to cases where it is sought to set aside the sale. This is not the case here. The Article of limitation governing the case is Article 95 of the second schedule, and under that the suit is in time.

With reference to item No. 2, we are clearly of opinion that the Subordinate Judge is wrong in applying section 43 of the Code of Civil Procedure to the case. He has apparently treated the previous suit as one for partition as between co-parceners under Hindu Law. But the plaintiff and 1st defendant stand in no such relation. They are merely co-owners as co-purchasers. The properties sued for formerly are separate and distinct from the property item No. 2 now sued for. There is no obligation on a joint owner to sue for a division of several properties held in common when he wants the division of only one. The plaintiff will, therefore, be entitled to a decree for half of item No. 2 upon the final disposal of this appeal in regard to item No. 1.

In compliance with the above order, the Subordinate Judge submitted that he was convinced that the revenue sale No. 1 was fradulently brought about by 1st defendant in collusion with the village officers to cause loss to plaintiff.

M. R. Ramakrishna Aiyar for appellant.

R. F. Grant, T. S. Tyagaraja Aiyar and *T. Krishnaswami Aiyangar* for 1st respondent.

The Court delivered the following

JUDGMENT:—The Subordinate Judge has found that there was fraud, and on the facts found by him, there can be no doubt of it.

Kuppusami Aiyar v. Subramania Aiyar.

The result is that, upon that finding and upon our former order in this case, the appeal is allowed. The decree of the Subordinate Judge is, therefore, reversed and that of the District Munsif restored with the appellant's costs in this and the lower appellate Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur Collins, *Kt.*, Chief Justice, and Mr. Justice Benson,

Nalla Karuppa Chettiar ... ... Appellant * (*Plaintiff.*)

v.

Iburam Saheb ... ... Respondent (*Defendant.*)

Nalla Karuppa Chettiar v. Iburam Saheb.

Jurisdiction of Foreign Courts—Decrees of Foreign Courts against absent foreigners—Personal actions.

In a purely personal action a Court has no jurisdiction to pass a decree against an absent foreigner who is not domiciled within the territorial jurisdiction of the country to which the Court belongs, or who has not in any other way submitted himself to its jurisdiction; and any such decree passed against an absent foreigner is an absolute nullity and cannot be made the basis of a suit in the Courts of the country to which such foreigner defendant belongs:

The defendant whose domicile was in British India was the chief partner in a firm which carried on trade in Kandy (Ceylon) which is foreign territory. The business was being carried on by another partner who resided in Kandy. The plaintiff who ordinarily resided in British India filed a number of suits against the firm in Kandy and had the summonses in those suits served on the resident partner. The defendant was not informed of these suits by his partner and he did not appear to defend them and decrees *ex parte* were passed against him. The plaintiff now sued the defendant in British India on those decrees.

Held:—That the defendant could not constructively be held to have been a resident of Kandy at the time when the plaintiff originally brought his suits simply because he was a member of a firm whose place of business was at Kandy and that the plaintiff's suit cannot be maintained.

Second appeal against the decree of the District Court of Tanjore in O. S. No. 5 of 1893.

The facts of the case appear sufficiently for the purpose of this report from the judgment of the Court.

V. Bhashyam Aiyangar for appellant.

C. R. Pattabhirama Aiyar for respondent.

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* S. A. 854 of 1895. 26th November 1896.

Nalla Karuppa Chettiar v. Iburam Saheb

The Court delivered the following

JUDGMENT:—The plaintiff sued in the Tanjore Subordinate Judge's Court in British India to recover certain sums under decrees passed in his favour by the District Court of Kandy in Ceylon. The defendant raised a number of pleas, but the Subordinate Judge found against him on all the issues and decreed the claim.

On appeal the District Judge tried three main questions, *viz.*—

(i) whether notice of the suit in the Kandy Court was so served on the defendant as to justify the British Indian Court in passing a decree on the judgment of the Foreign (Kandy) Court;

(ii) whether the Foreign Court had jurisdiction over the person of the defendant who was domiciled and resident in British India; and

(iii) whether the defendant was a minor when the judgment was given and whether, in consequence, the judgment was one which could be made the basis of a suit in British India.

On all these issues the District Judge decided in defendants' favour and, therefore, dismissed the suit.

The plaintiff now appeals on all the issues decided against him.

We do not, however, think it necessary to discuss the first and the third of the above issues, as we are of opinion that the decision of the District Judge on the 2nd issue is right, and that the plaintiff's suit must fail on that ground, whatever the decision on the other issues might be.

The defendant was the chief partner in the firm of Iburam Saheb and Co., which carried on business in Kandy under the terms of a deed of partnership (exhibit A). The plaintiff was domiciled and ordinarily resident in British India, but he visited Kandy once or twice and his family owned some immoveable property there in which he claimed to have an interest.

The plaintiff was not even temporarily resident in Ceylon when the suits were instituted in the Kandy Court or subsequently. The business was, under the terms of exhibit A, managed by one of the other partners who lived in Kandy. When the suits were filed,

Valla Karuppa Chettiar v. buram Saheb.

summonses on the partners, including the defendant, were served on the resident partners.

The question which we have to decide is this.

Assuming that service of the notice of the suit on defendant's partner is sufficient service on defendant and assuming that defendant is entitled to no protection on the score of minority, had the Kandy Court jurisdiction in the above state of facts to pass a decree against the defendant's person ?

It is conceded that for the present purpose the Kandy Court must be considered to be a foreign Court. The Courts of British India will be guided in this matter by the same principles as are adopted by the Courts of England. The true principle on which the judgments of foreign Courts are enforced in England is that the judgment of a Court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum decreed which the English Court is bound to enforce, and consequently that anything which negatives that duty or forms a legal excuse for not performing it is a defence to the action (*Schibsby* v. *Westenholz*, L. R. 6 Q. B. 155, 159,). In the case of *Rousillon* v *Rousillon* (14 Ch. D. 351, 370, 371) *Fry, L. J.*, referring to *Schibsby* v. *Westenholz* and *Copin* v. *Adamson* (L. R. 9 Exch 345), explained the circumstances which have been held to impose upon the defendant the duty of obeying the decision of a foreign Court. He said "the Courts of this country consider the defendant bound where "he is a subject of the foreign country in which the judgment has "been obtained; when he was resident in the foreign country "when the action began; where the defendant in the character of "plaintiff has selected the *forum* in which he is afterwards sued; "where he has voluntarily appeared; where he has contracted to "submit himself to the *forum* in which the judgment was obtained, and, possibly if *Becquet* v. *MacCarthy* be right, where the defendant has real estate within the foreign jurisdiction in respect of which the cause of action arose while he was within that jurisdiction."

If these tests are adopted in the present case, it will be seen that not one of them applies. It is, however, urged that the law as to the authority to be ascribed to foreign judgments is in course of development by means of judicial legislation and we are asked, on the analogy of *Becquet* v. *MacCarthy*, to hold that the defendant by carrying

on business through his partners at Kandy should be regarded as constructively resident there and as having impliedly bound himself to submit to the jurisdiction of the Court under the protection of which his business was carried on. We do not think that the current of decided cases will justify us in going so far. In *Becquet* v. *MacCarthy* the defendant still held, at the time of the suit, a public office in the colony in which he was sued, and the cause of action arose out of, or was connected with, it. His duties required him to be present in the colony though, in fact, temporarily absent. This case was stated in *Don* v. *Lippmann* (5, Cl. & F., p. 1) "to go to the verge of the law" and the Privy Council in the recent case of *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* (L. R. 22, I. A., 171, at p. 186) were of the same opinion, and stated that, if the case could not have been distinguished by the said special features from the case of any absent foreigner who, at some previous time, might have served the Colonial Government, they would have regarded the case as wrongly decided. In the present case, there was no obligation on the defendant to reside at Kandy, nor did he do so except for very short periods. The business was carried on by a resident partner who, by the fact of his residence, was liable to the Colonial jurisdiction, but we are unable to find any ground for holding that the defendant was constructively resident, or at the time of the suit, present within the jurisdiction of the Kandy Court. Nor does the possession by the defendant of some immoveable property in Kandy, give that Court jurisdiction over him in matters of contract like the present. For in *Schibsby* v. *Westenholz*, L. R., 6 Q. B., 158, 159, it was observed :—"We doubt very much whether the possession of "property, locally situated in that country and protected by its "laws, does afford such a ground. It would rather seem that, "while every tribunal may very properly execute process against "the property within its jurisdiction, the existence of such pro-"perty, which may be very small, affords no sufficient ground "for imposing on the foreign owner of that property, a duty or "obligation to fulfil the judgment." The general law is laid down very clearly by the Privy Council in the case of *Sirdar Gurdyal Singh*, the *Rajah of Faridkote*, in these words: "All jurisdiction "is territorial, and *extra territorium jus di centi impune non paretur*. "Territorial jurisdiction attaches (with special exceptions) upon all "persons either permanently or temporarily resident within the

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"territory while they are within it; but it does not follow them "after they have withdrawn from it, and when they are living in "another independent country. It exists always as to land within "the territory, and it may be exercised over moveables within the "territory; and in questions of status or succession governed by "domicil, it may exist as to persons domiciled, or who when living "were domiciled, within the territory." As between different provinces under one sovereignty, (*e.g.*, under the Roman Empire) the legislation of the Sovereign may distribute and regulate jurisdiction; but no territorial legislation can give jurisdiction which any foreign court ought to recognise against foreigners, who owe no allegiance or obedience to the power which so legislates.

"In a personal action to which none of these causes of jurisdiction apply, a decree pronounced in *absentem* by a foreign court, "to the jurisdiction of which the defendant has not in any way submitted himself, is by International Law an absolute nullity. He "is under no obligation of any kind to obey it; and it must be "regarded as a mere nullity by the courts of every nation except "(when authorized by special local legislation) in the country of "the *forum* by which it was pronounced.

"These are doctrines laid down by all the leading authorities "on International Law; among others by Story (Conflict of Laws, "2nd Edition, Ss. 546, 549, 553, 554, 556, 586), and by Chancellor "Kent, (Commentaries, Vol. I, p. 284, Note C, 10th Edition), and "no exception is made to them in favouring of the exercise of juris- "diction against a defendant not otherwise subject to it, by the "courts of the country in which the cause of action arose, or, (in "cases of contract) by the courts of the *locus solutionis*. In those "cases, as well as all others, when the action is personal, the courts "of the country in which the defendant resides have power, and "they ought to be resorted to to do justice."

We do not think that there are any special circumstances in the present case to take it out of the general rule that the plaintiff must sue in the court to which the defendant is subject at the time of the suit—a rule which is stated by Sir Robert Phillimore (International Law, Vol. 4, S. 891), and by the Privy Council in the case already quoted "to be at the root of all international, and of most

domestic jurisprudence on this matter." That was the course which the plaintiff in this case ought to have followed if he desired a remedy against the defendant personally. Nalla Karuppa Chettiar v. Iburam Sahib.

On the ground that the Kandy Court had no jurisdiction, the lower appellate Court rightly dismissed the suit. We, therefore, confirm the decree of that Court and dismiss the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur Collins, *Kt.*, Chief Justice, and Mr. Justice Benson.

Somayajulu ... Petitioner* (*Plaintiff*).

v.

Surayya and another ... Respondents (*Defendants*).

Civil Procedure Code, Ss. 50 (*b*), 54 (*d*)—Description of parties to suit. Somayajulu v. Surayya.

A plaint was presented in a court without mentioning the ages of the defendants to the suit and without giving the father's name of one of the defendants. The Court returned it for amendment in these particulars and for re-presentation within a particular time. As this was not done the Court rejected the plaint.

Held, that the order of the Court was reasonable and within its discretion.

Petition, under S. 622 of the Civil Procedure Code, praying the High Court to revise the order of the Court of the District Munsif of Rajamahandry in the matter of a plaint presented by the petitioner.

In the matter of the plaint presented on the 18th January 1895 between Somayajulu as plaintiff and Surayya and Erakayya as defendants, the District Munsif passed the following order:—

"The observation made by the Court in its order of the 25th February last to the effect that 'the plaintiff (a First Grade Pleader) has himself given the ages of the parties in certain plaints he filed,' was not based on any wrong information given to it, but on its own personal examination of the plaint presented by Mr. Somayajulu with his own *sole* signature on behalf of Mahomed Thambi against Amudala Nagadu wherein they are shown, respectively, 32 and 33 years.

"Mr. Somayajulu can, from his experience, entertain no doubt as to age also coming under the word 'description.' He is aware that, in

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* C. R. P. No. 59 of 1896. 6th October 1896.

Somayajulu v. Surayya.

giving the description of a witness in his deposition, his age, father's name, residence, caste and calling, etc., are entered. When so many kinds of descriptions are thought necessary in the case of persons who are before court, much more must be the reasons for giving the descriptions of persons who may not appear at all in court, or against whom the Court may be asked, not unfrequently to pass *ex parte* decrees.

"In the absence of any authoritative definition of the word 'description,' the practice observed as regards witnesses—a practice obtaining throughout the whole Presidency—must form a very good precedent.

"Besides, it has been the practice of this Court for some years past to give also the ages of the parties; and it appears to me to be a very good practice. In certain cases, instead of the plaintiffs and the defendants, their sons answered to the names of their fathers, and the Court had to find out the mistake at times only by reference to the ages given in the plaints. A process-server can himself better identify a party by his age, if it is also given, whereas he will have to depend on the information of others, if only the other kinds of descriptions are given. It may also sometimes help the Court to determine whether a party is a major or minor.

"At any rate, it has become the established practice of this Court; and all the vakils observe it, and I do not see why any departure should be allowed in the case of a single vakil. I must, therefore, see that the practice is uniformly followed until an order to the contrary is obtained from higher authorities.

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"Mr. Somayajulu was given full oppurtunity twice to give the ages of the defendants as well as the father's name of the second defendant. This he has not done. Neither did he give his own age, a matter about which he can have no difficulty. In an agricultural country like India where almost every one follows the profession of a ryot, there must be a full description to identify a man besides his caste, calling and place of residence. We often meet in a village with persons of the same name, caste and calling; and summons in not a few cases had to be returned unserved. The vakil has not thought fit to give the second defendant's father's name even. The plaint will, therefore, be rejected under cl. (*d*), S. 54 of the Civil Procedure Code."

R. Sriramulu Sastri for petitioner.

The counter-petitioner was not represented.

The Court delivered the following

JUDGMENT :—The requirement of the District Munsif is a reasonable one, and within his discretion. We decline to interfere.

Somayajulu v. Surayya.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Arthur Collins, *Kt.*, Chief Justice, and Mr. Justice Benson.

Sheshama Nayani ... Appellant * (*Claimant.*)

District Forest Settlement Officer of North Arcot for the Secretary of State for India ... Respondent (*Defendant.*)

Collector acting in a judicial capacity—Notice to appear before Collector—Place of hearing.

Notices to parties to appear before a Collector when acting in a judicial capacity, should specify the building or other specific locality where he will sit.

Sheshama Nayani v. District Forest Settlement Officer of North Arcot.

Appeal against the order of the Court of the Collector of the North Arcot District passed on District No. $\frac{1098}{\text{Eng}}$ (petition No. 2673 of 1895) in the matter of claim No. 17 of 1894, on the file of the District Forest Settlement Officer of North Arcot.

An appeal had been preferred to the Collector of North Arcot against the decision of the District Forest Settlement Officer under the Madras Forest Act. The appeal was posted for hearing at 3 P.M. on the 9th of August 1895, at Chittoor. The place where the Court was to be held was not mentioned in the notice. The appellant accordingly went to the Collector's office on the day in question and was waiting there, when at about 5 or 6 minutes before 3 P.M., the appointed time, he was informed that the appeal was to be heard not in the office but in the Collector's private quarters which was some half a mile away from the office. But before the appellant could hasten thither, the Collector had taken up the appeal and dismissed it for default. He then presented a petition to the Collector which was also thrown out with the following endorsement : "The petitioner is informed that the appeal cannot be readmitted. There

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* A. A. O. 165 of 1895, 18th September 1896.

Sheshama Nayani v. District Forest Settlement Officer of North Arcot.

was more than enough time to come up to the place where the Court was held, even if it is true, that he went to the correspondence branch of the Collector's office. It is well known that the Collector has no room there." Thereupon, the appellant preferred this appeal to the High Court supported by affidavits stating the above mentioned facts.

P. R. Sundara Aiyar for appellant.

The Acting Government Pleader (*N. Subrahmaniem*) for respondent.

The Court delivered the following

JUDGMENT:—We are of opinion that on the allegations in the affidavit, which are uncontradicted, the appeal ought to be re-admitted and disposed of according to law and we direct that this be now done. Inasmuch as some Collectors hold office in the building where the correspondence branch of the office is located, and some at the Collector's own house which is some half mile away from the former building, notices to appear before the Collector when acting in a judicial capacity should specify at which building he will sit.

Costs in this appeal will follow the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:— Mr. Justice Subrahmania Aiyar and Mr. Justice Davies.

Venkatappayya and others ... Appellants* (*Plaintiffs*).

v.

Venkatapathi and others ... Respondents (*Defendants*).

Venkatappayya v. Venkatapathi.

Religious Endowments Act, XX of 1863, S. 18—Leave to institute suit—Judicial proceeding.

A sanction given at the instance of a petitioner under S. 18 of the Religious Endowments Act, XX of 1863, for leave to institute a suit, though without first giving notice to the counter-petitioners and hearing their objections, if any, is a legal sanction.

Appeal against the decree of the District Court of Kistna in O. S. No. 4 of 1895.

* A. No. 230 of 1895. 4th December 1896.

The plaintiff sued for the removal of the defendants from the management of the temples of Sree Trivikrama Swami and Sri Agastiswara Swami in the taluk of Bapatla on account of breach of trust. The plaintiff had previously applied and obtained the sanction of the Court under S. 18 of the Religious Endowments Act, but the sanction had been given without any notice to the defendants. The District Judge who tried the case framed issue on the question whether such an *ex parte* sanction was enough under the Act for the maintenance of the suit and delivered the following judgment on the point :—

"Issue 2 has been argued before me by the vakils on both sides, the point raised being whether a sanction given under section 18 of the Religious Endowments Act without notice to the opposite side is a legal sanction.

"It is perfectly clear to me that an order granting sanction under section 18 of the Act is a judicial proceeding. The principle of law that no judicial proceeding is regular or valid without notice being given to the person charged or complained against is laid down in numerous rulings. Such rulings are referred to in *Queen-Empress* v. *Sheik Beari*, I. L. R., 10 M., 232, and *Gompertz* v. *Goldingham*, I. L. R., 9 M., 319. The fact that granting sanction is a judicial proceeding which the High Court have power of revising is clear from *Gandavathara* v. *Devanayaga Mudali*, I. L. R., 7 M., 221, and *Srinivasa* v. *Venkata*, I. L. R., 11 M., 148 (*vide* observations at the end of p. 150 and top of p. 151).

"I hold, therefore, that the sanction for institution of this suit under S. 18 of the Religious Endowments Act is illegal, as it was granted without a notice to the opposite side.

"In the absence of a legal sanction to institute the suit, the suit cannot be entertained, and is dismissed under S. 18 of the Religious Endowments Act with costs."

The plaintiff then preferred this appeal to the High Court.

C. R. Pattabhirama Aiyar for appellants.

K. Narayana Rau for respondents.

The Court delivered the following

JUDGMENT :—We do not think that the general principles of justice as to hearing the other side is applicable to this case,

Venkatappayya v. Venkatapathi.

since the words in the section *"on the perusal of the application"* clearly indicate nothing else than that perusal is required of the Judge before giving his sanction. These words render untenable the position that the Judge is bound to do more, that is in the way of giving notice, hearing parties, and so on, if the application itself satisfies him. If any such regular preliminary enquiry had been intended the language of the section must have been very different.

We, therefore, hold the Judge was wrong in considering the sanction void for want of notice prior to its being granted.

We reverse his decree and remand the suit for disposal according to law. Costs to abide and follow the event.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Davies.

Alangaran Chetti and another ... { Appellants * (*1st and 2nd Defendants*).

v.

Lakshman Chetti and others ... { Respondents (*Plaintiff, 3rd and 4th Defendants*).

Alangaran Chetti *v.* Lakshman Chetti.

Transfer of Property Act, S. 101—Mortgages, priority of—Mortgagee purchaser of the right to redeem.

A executed a mortgage to B in 1871. In 1876 he executed another to C, and in 1879, after an adjustment of accounts with B, he executed another mortgage for the balance found due, all the mortgages being on the same properties. In 1884, C brought a suit on his mortgage and purchased the mortgaged properties in execution of his decree. In a suit by B for sale of the properties and payment of his mortgage debt,

Held: that B was entitled to priority for payment of his debt which was virtually a debt of 1871 over that of C which was only a debt of 1876.

Rupabai v. *Audimulam*, I. L. R., 11 M., 346, and *Seetharama* v. *Venkatakrishna*, *Ib.*, 16 M., 94, referred to.

Appeal against the decree of the Subordinate Judge's Court of Madura (West) in O. S. No. 10 of 1893.

This was a suit to recover from the defendants and by sale of the mortgaged properties, Rs. 6,248 due to one Narayana Chetty under a bond executed by the third defendant to the first defendant and Narayana Chetty. The third defendant, the Zemindar of Varapoor, in the Sivaganga Zemin, executed a simple mortgage of some of his lands to one Ramanadan Chetty and the first defendant for Rs. 12,500, of which Rs. 7,500 was due to Ramanadan Chetty and Rs. 5,000 to the first defendant. Subsequent to this, he made certain payments to Ramanadan Chetty, and in 1879, after an adjustment of accounts with him, Rs. 3,168-12-4 was found to him. For this sum and for the sum of Rs. 10,031-4-0 due to the first defendant for principal and interest under the deed of 1871, the third defendant executed another mortgage of the very same properties in the names of Narayana Chetty, the undivided brother of Ramanadan Chetty, and the first defendant. Independent of these transactions the third defendant had executed to the first defendant

* A. No. 172 of 1895. 7th December 1896.

Alangaran Chetti v. Lakshman Chetti.

another mortgage on the properties in 1876. In 1884 the first defendant sued on his mortgage of 1876, brought the properties to sale and purchased them in execution. In 1890 Narayana Chetty assigned the share due to him under the mortgage of 1879 to the plaintiff who brought the present suit in 1893 for the recovery of his amount. The first defendant among other pleas contended that if a sale of the properties be ordered he was entitled to priority for his mortgage of 1876 over that of the plaintiff, which was only a mortgage of 1879. The Sub-Judge gave a decree for the plaintiff, and on the question of priority his judgment was as follows:—

"The debt in O. S. No. 20 of 1884 is the debt due under Exhibit G, dated 27th March 1876. Exhibit A is, no doubt, dated 16th October 1879. The prior debt should have priority over Exhibit A of 1879. The prior debt of Exhibit A was due under Exhibit E being for its balance. It has been ruled (*Gokaldas Gopaldas* v. *Puranmal*, I. L. R., 10 C., 1035, and *Rupabai* v. *Audimulam*, I. L. R., 11 M., 346) that, if a subsequent document is taken in settlement or discharge of a prior bond, it takes the place of the prior document. Consequently, plaintiff has priority of right. This issue is found in the affirmative."

The first defendant then preferred this appeal to the High Court.

P. R. Sundara Aiyar for appellants.

S. Subrahmania Aiyar for first respondent.

The Court delivered the following

JUDGMENT:—The only point argued is the question of priority raised in the third issue. It is contended that the principle laid down by the Privy Council in *Gokaldas Gopaldas* v. *Puranmal*, I. L. R., 10 C., 1035, is applicable only to the case of a purchaser of the equity of redemption. There is no ground for limiting the principle to that case only. It is true that that is the only case provided for by S. 101 of the Transfer of Property Act, but that is a—if not the—very extreme case where otherwise an extinguishment of the charge would ordinarily be presumed. This Court has in several instances applied the principle to cases like the present. *Rupabai* v. *Audimulam*, I. L. R., 11 M., 346, and *Seetharama* v. *Venkatakrishna, ib.*, 16 M., 94, and see also the judgment in appeal No. 113

of 1895. The Subordinate Judge was therefore right in holding that by the mere execution of A, the security under E in respect of the plaint-debt was not given-up. Alangaran Chetti v. Lakshman Chetti.

The appeal accordingly fails and is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Boddam.

Paramananda Doss Ananda Doss and another ... Appellants* (*Counter-Petitioners*),

v.

Mahabar Dossji ... ... Respondent (*Petitioner*).

Civil Procedure Code, Ss. 228, 244, 257(*a*), 278—Representatives to parties to suit—Mortgagee of attached property—Claim by mortgagee to property attached—Judgment-debt, agreement in satisfaction of—Court executing decree, sanction of. Paramananda Doss Ananda Doss v. Mahabar Dossji.

A court to which a decree has been transmitted for execution has no power to sanction an agreement of the nature contemplated by S. 257(*a*), Civil Procedure Code. That power can be exercised only by the Court that actually passed the decree.

The word "representatives" in S. 244, Civil Procedure Code, ought to be construed liberally and it includes the mortgagee of property mortgaged subsequent to its attachment in execution of a decree.

In execution of a decree for money A attached certain properties of his judgment-debtor; subsequent to the attachment and before sale the judgment-debtor mortgaged the properties attached to B who took possession under his mortgage. B then put in a claim petition under S. 278 and objected to the sale alleging that the decree had been satisfied. On B's objection the District Judge found that the decree had been satisfied, and accordingly dismissed the execution petition.

Held, that B was a 'representative' of the judgment-debtor within the meaning of S. 244, and

that an appeal lay under S. 244 against the order of the District Judge.

Appeal against the order of the District Court of North Arcot passed on miscellaneous petition No. 93 of 1894 in execution application No. 2 of 1884 (O. S. No, 194 of 1883 on the file of the High Court).

This is an appeal against the order of the District Court of North Arcot in M. P. No. 93 of 1894 in execution of the original suit No. 194 of 1883, Madras High Court.

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* A. A. O. No. 33 of 1896. 12th November 1896.

Paramananda Doss Ananda Doss v. Mahabar Dossji.

The counter-petitioner-appellant obtained a *money decree* on 20th September 1883 in the said O. S. No. 194 of 1883 against the Karvetnagar Raja, and in April 1884 attached some villages in the Tiruttani taluk appertaining to the zemindari of the defendant in execution of the said decree. In December 1884, the Raja mortgaged with possession the whole of Tiruttani taluk to the Tirupathi Devasthanum, of which the Mahunt is the vigharamkartha or manager. Application for sale notice was made by the decree-holder (counter-petitioner), and the sale of the properties attached was ordered on the 8th September 1884. The sale was constantly postponed on the joint application of the judgment-creditor and the judgment-debtor, the latter on each occasion paying certain sums to the judgment-creditor. In July 1885 one of these applications was made in which it was stated that the defendant had agreed to pay higher interest than that provided in the decree. In M. P., No. 44 of 1894 the counter-petitioner (judgment-creditor) stated that the balance had been adjusted up to that date between him and the Zemindar and asked for a sale warrant to issue for the sum of Rs. 23,238-4-0. This amount had been arrived at by calculating the higher rate of interest and without giving credit to the various sums paid by the Zemindar on the various occasions when the sale had to be adjourned. At this juncture the present petition was put in by the mortgagee under S. 278, and he contended that the several sums paid by the Zemindar ought to have been credited towards the decree amount, that the higher rate of interest ought not to have been allowed as the necessary sanction had not been given by the Court which passed the decree; that the sanction which was alleged to have been given by the North Arcot District Court was of no avail, as it was only a Court to which the decree had been transferred for execution and not the Court which originally passed the decree; and that according to the proper calculation the decree was satisfied and incapable of execution.

The District Judge agreeing with the contention of the petitioner (mortgagee) ordered fresh accounts to be taken calculating the lower rate of interest and giving credit to the sums paid by the Zemindar, and on finding that the result was that the whole decree had been satisfied, dismissed the decree-holder's petition for

execution. The portion of his judgment relevant for the purposes of this report is as follows :—

"A case more in point is the decision in *Venkatasami* v. *Narayanaratnam*, I. L. R, 11 M., 301, where it was held that the words 'passed by that Court' in S. 360 did not allow of the procedure described in the section by any Court, other than that which passed the decree, but to which the decree had been transferred in execution."

"This is a ruling very much to the point. There are a series of decisions cited which lay it down that a Court to which a decree is transferred for execution has not got a number of powers possessed by the Court which passed the decree. Thus it cannot amend an alleged error [*Rao Oomrao Sing* v. *Sutun Lal* (I. N. W. P. H. Court R. 168)]; it cannot supply provisions not contained in the decree [*Kristo Kishore Dutt* v. *Rooplall Doss* (I. L. R., 8 C., 687)]; it cannot refuse the execution on the ground that the plaintiff could not maintain the suit, nor apparently could it do more than stay proceedings on an allegation that the decree had been obtained by fraud [*Subramaniem Pattar* v. *Panjeamma Kunjiamma* (I. L. R., 4 M., 324)], nor extend the terms of a decree so as to execute it against a legal representative not brought in under S. 234 [*Muttia* v. *Veerammal* (I. L. R., 10 M., 2?3)], nor give interest on costs awarded in the decree when the decree does not award such interest [*Forester* v. *Secretary of State* (I. L. R., 3 C., 161)].

"All these rulings go to show that the terms of S. 228 must be strictly observed. But they do not touch the real question. S. 228 undoubtedly gives to the Court executing the decree such powers as it would have had if the decree had been passed by itself but only 'in executing such decree.' Now a Court executing its own decree could not, *in execution*, amend or alter or add to or enlarge the scope of its own decree. That would have to be done by distinct proceedings and the amended or altered decree executed. But a Court executing its own decree would certainly have power to adjourn the sale (S. 291), postpone it to allow the amount to be raised by private sale, &c. (S. 305), set aside the sale (Ss. 312 and 313), stay proceedings (S. 139). The power to give time for the satisfaction of the judgment-debt is one of such proceedings in execution and would come under the provisions of S. 228 if it were not, by its wording, expressly confined to the Court which passed the decree. All other sections describing the procedure in execution speak only of the Court. S. 360 is the only exception, and there, as already pointed out, the strict wording has been followed in spite of S. 228.

Paramananda Doss Ananda Doss v. Mahabar Dossji.

"I am of opinion, therefore, that the District Court had no authority to grant time under S. 257-A. It follows, therefore, that any amounts paid in consideration of such postponements must, under the second and third clauses of S. 257-A, be applied in satisfaction of the judgment-debt.

"In some cases, the applications put in for adjournment explicitly state the amount paid is 'towards the sum due' or 'for the decree.' In such cases there can be no question that it must be applied in satisfaction of the decree."

The petitioner then appealed to the High Court.

The Advocate-General (J. H. Spring Branson), R. Ranga Rau and *R. Ramanujachariar* for appellants.

V. Bhashyam Aiyangar and *S. Gopalasami Aiyangar* for respondent.

V. Bhashyam Aiyangar raised a preliminary objection and said, "There is no appeal as the respondent was not a party to the decree; this is no mortgage decree, as then there may be some doubt as to whether the mortgagee does not represent the original defendant. Attachment creates an interest, but does not make the mortgagee a representative of a party to the suit under S. 244. In mortgage suits, the subject-matter of the suit being the mortgage property, the mortgagee may be considered a representative, perhaps, though he may not have been a party originally. Ss. 275 and 278 give special statutory reliefs to effectuate attachment and mere attachment cannot convert the suit into a suit with reference to the property attached. Under S. 276 attachment makes alienations invalid, but cannot have any further effect as regards the nature of the suit and the decree."

The *Advocate-General (J. H. Spring Branson)* and *R. Ranga Rau* contended that the attachment before the mortgage made the mortgagee a party practically.

Their Lordships overruled the preliminary objections, and after hearing the appeal on the merits delivered the following

JUDGMENT:—No doubt in *Jagat Narain* v. *Jag Rup, Oldfield*, J., observed that the word "representative" in S. 244, Civil Procedure Code has no more extended meaning than heir, devisee, or executor, (I. L. R., 5 A., 456). But in *Badri Narain* v. *Jai Kishen Das*, I. L. R., 16 A., 483, *Edge*, C. J., and *Banerji*, J., give strong

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reasons for holding that the term in question has in the context a wider signification. Accordingly, when a person purchased mortgaged property from the mortgagor after a decree had been obtained against him by the mortgagee for the enforcement of the latter's right, such purchaser was held by the Calcutta and Allahabad Courts to be, within the meaning of S. 244, a "representative" of the mortgagor-defendant (*Gour Sundar Lahiri* v. *Hem Chunder Cowdhury*, I. L. R., 16 C., 355 at 364, and *Janki Prasad* v. *Ulfat Ali*, I. L. R., 16 A., 284.

This being so, it is difficult to distinguish on principle the case of the respondent here from the decisions just cited. For, though in the present instance, the appellants' decree against the Raja, in execution of which the questions in dispute have arisen, was for money only, yet as at the time the respondent obtained from the Raja the taluk on mortgage, the property had been. attached on account of the appellants' decree, the respondent, who holds the mortgage which is subject to the said lien, must be held to stand on a position substantially similar to that occupied by the purchasers of the equity of redemption after the mortgage decrees in the Calcutta and Allahabad cases referred to above.

The contention, therefore, that the respondent is not a representative of the judgment-debtor, the Raja, within the meaning of S. 244 and the preliminary objection founded thereon that no appeal lies are in our opinion unsustainable.

The next question is whether the North Arcot District Court has power to sanction agreements of the kind referred to in S. 257 *a* of the Civil Procedure Code. Clearly it had not, inasmuch as it was not the Court which passed the decree. The words of the section absolutely confine the power to grant the sanction to courts which pass the decree.

The view taken by the District Judge on this point is right.

The appeal fails and is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Davies.

Appa Rao Savaji ... ... Appellant* (*Plaintiff*).

v.

Krishnamurti ... ... Respondent (*Defendant*).

Appa Rao Savaji *v.* Krishnamurti.

Registation Act, III of 1877, S. 77—Suit to compel registration, limitation for—Limitation Act, XV of 1877, S. 5—Court closed when period expires.

S. 5 of the Limitation Act does not govern suits under S. 77 of the Registration Act.

A plaintiff, who institutes a suit to compel the registration of a document under S. 77 of the Registration Act after the 30 days allowed by it, is not entitled to the benefit of S. 5 of the Limitation Act.

Veeramma v. *Abbiah,* I. L. R., 18 M., 99, followed.

Appeal against the decree of the Subordinate Judge's Court at Ellore in O. S. No. 6 of 1895.

The plaintiff sued to compel the registration of a muchilika under S. 77 of the Registration Act, as the District Registrar of Kistna refused to register the same. The order of the Registrar was passed on the 6th December 1894, and the suit was brought on the 8th January 1895. The defendant pleaded that the suit was barred by limitation, as it was brought more than 30 days after the order of the District Registrar refusing registration. The plaintiff claimed the benefit of S. 5 of the Limitation Act, and contended that as the Court was closed for two weeks for Christmas, and as the plaint was filed on the day that the court re-opened, the suit was not barred. The Sub-Judge held that the case was governed by the decision of the Full Bench in I. L. R., 18 M., 99, and dismissed the suit. The plaintiff then preferred this appeal to the High Court.

V. Bhashyam Aiyangar and *S. Gopalasami Aiyangar* for appellant.

P. S. Sivaswami Aiyar for respondent.

The Court delivered the following

JUDGMENT:—Though the precise point for decision in the Full Bench case, *Veeramma* v. *Abbiah*, I. L. R., 18 M., 99, related to

* A. No. 188 of 1895. 4th December 1896.

the applicability of S. 7 of the Limitation Act alone to suits brought under S. 77 of the Registration Act, yet having regard to the reasoning as a whole adopted by the learned Judges in arriving at their conclusion that S. 7 did not apply, we think we cannot but hold, on the strength of that decision that S. 5 also is inapplicable to such suits.

Appa Rao Savaji v Krishnamurti.

Arguments, however, have been urged before us which appear to have considerable force in favour of the applicability of S. 5, but we think the question is concluded by the Full Bench decision, and consequently that we are not at liberty to discuss it.

The appeal fails and is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur J. H. Collins, *Kt.*, Chief Justice, and Mr. Justice Benson.

The Queen-Empress ... ... Appellant.

v.

Krishna Reddi ... ... Accused.

Nuisance, public—Street, public encroachment on—I. P. C., Ss. 268, 290

Queen-Empress v. Krishna Reddi.

An encroachment by a private individual building over a portion of a public street is a public nuisance within the meaning of S. 268, I. P. C., and is punishable under S. 290, I. P. C., whether any particular individual was actually injured or obstructed by the act or not.

Appeal under section 417 of the Code of Criminal Procedure against the judgment of acquittal passed on the accused in Criminal Appeal No. 29 of 1896 by the Head-quarters General Deputy Magistrate of Kistna Division in reversal of the conviction and sentence passed in C. C. No. 93 of 1896 on the file of the Taluk Second-class Magistrate of Vinukonda.

The *Public Prosecutor* for appellant.

The accused was not represented.

The Court delivered the following

JUDGMENT:—The Deputy Magistrate is wrong in supposing that an encroachment by a private person building over a portion

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* Cr. A. No. 424 of 1896. 17th December 1896.

Queen-Empress v. Krishna Reddi.

of a public street is not a "public nuisance" within the meaning of section 268, Indian Penal Code, or that it is necessary for the prosecution in such a case to adduce evidence that any particular person was injured or obstructed by the encroachment. The public are entitled to the use of the full width of the public street, however wide it may be, and whoever builds over a portion of a public street does an act which must necessarily cause obstruction to persons who may have occasion to exercise their right of using the portion encroached upon. It is no answer to say that the street is still wide enough for all comers. Each and every part of a public street is open to lawful use by the public, and it is the duty of the public authorities to prevent encroachment thereon by private persons. The Deputy Magistrate is also wrong in saying that such an encroachment is a civil, not a criminal, matter. It is one of the large class of offences against the public which are dealt with in chapter XIV of the Indian Penal Code, and it is appropriately punishable under section 290, Indian Penal Code. The Deputy Magistrate's strictures on the authorities for vindicating the rights of the public against encroachments on the public streets are wholly out of place.

We set aside the acquittal by the Deputy Magistrate and direct him to restore the appeal to his file and dispose of it in accordance with law.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subramaniya Aiyar and Mr. Justice Benson.

Srinivasasami Aiyangar ... ... Appellant * (*2nd Deft.*).

v.

Ponnammal ... ... Respondent (*Pltf.*).

Srinivasasami Aiyangar v. Ponnammal.

Hindu Law—Son's liability—Mitakshara family—Mortgage of ancestral property—Suit by mortgagor against father and son—Antecedent debt—Form of decree.

Under the Mitakshara law a mortgage by a father is not binding as a mortgage on the son's share of the ancestral property, in the absence of any proof of a debt antecedent to the mortgage or of family necessity even though the son fails to show that the debt was contracted for an illegal or immoral purpose.

Khalilul Rahman v. *Gobind Pershad*, I. L. R., 20 C. 328, dissented from.

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* S. A. No. 1597 of 1895. 22nd February 1897.

Second appeal against the decree of the District Court of Tanjore in A. S. No. 504 of 1894, confirming the decree of the Court of the District Munsif of Valangiman in O. S. No. 358 of 1889.

The facts of the case are as follows :—

This was a suit to recover Rs. 1,523-2-0 with costs, being the principal and interest due under a hypothecation bond executed by the 1st defendant on the 24th November 1883, in favour of the plaintiff's husband. The 2nd defendant was sought to be made liable to the plaint claim, being the undivided son of the 1st defendant. The 2nd defendant pleaded that the plaint bond had no consideration and that there was no necessity for the 1st defendant to borrow at the time of the plaint bond. The District Munsiff held that consideration passed for the bond, but that it was not shown by the plaintiff for what purpose the loan was contracted. He however held that the 2nd defendant was liable as a son under the Hindu Law to pay his father's debt as he had not proved that it was illegal or immoral. He accordingly passed a mortgage decree in favour of the plaintiff as against the 2nd defendant's share also which was confirmed on appeal by the District Judge.

The 2nd defendant appealed to the High Court.

V. Bhashyam Aiyangar, P. S. Sivaswami Aiyar and *S. Gopalsami Aiyangar* for appellant.

T. Ranga Chariar for *C. Sankara Nair* for respondent.

Sivaswami Aiyar.—The finding of the Courts below is that while there was consideration for the plaint mortgage, there was no proof of any antecedent debt or of any family necessity. It is also found that the son has not shown that the debt was illegal or immoral.

The Privy Council has always insisted upon an antecedent debt or some family necessity as a pre-requisite for an alienation in order that it may bind the son—*Suraj Bunsi Koer* v. *Sheo Pershad Singh*, I. L. R., 5 C., 148, at p. 171.

A mortgage is an alienation just as much as a sale. It is a transfer of an interest in immoveable property. *Vide* Transfer of Property Act, S. 58.

In *Chinnayya* v. *Perumal*, I. L. R., 13 M. 51, a sale in the absence of an antecedent debt was held not binding on the son. The same principle applies to the case of a mortgage.

Srinivasa-sami Aiyangar *v.* Ponnammal.

In L. P. A. 12 of 1893 which arose at a former stage of this litigation, it was decided by *Muthuswami Aiyar* and *Best, J. J.*, that there must be an antecedent debt.

Subrahmania Aiyar, J.—A father can execute a pro-note and six hours after, execute a mortgage and the mortgage is for an antecedent debt, and the son is bound by it. How can this distinction be explained on principle?

Sivaswami Aiyar.—No doubt it appears to be anomalous, but it must be remembered that the decisions which permitted the father to alienate his property for an antecedent debt introduced an exception to the general rule by which a co-parcener is restrained from dealing with the shares of his other co-parceners.

Subrahmaniya Aiyar, J.—Are you really protecting the interest of the son by the distinction you draw? Would not the son in this very case be liable in execution of the decree passed against the father?

Sivaswami Aiyar.—I admit that a money decree can be passed in this case against the son also, and that the son's share would be liable to be proceeded against in execution of the money decree. The position, however, of a money decree-holder is different from that of a mortgage decree-holder; a money decree-holder is subject to the risks of alienation by the son prior to attachment.

Subrahmaniya Aiyar, J.—Has not the Calcutta High Court held differently?

Sivaswami Aiyar.—Yes; in *Khalilul Rahman* v. *Gobind Pershad*, I. L. R., 20 C., 328. But the Madras High Court and the Calcutta High Court have consistently held different views on the subject.

To justify an alienation there must be a debt to discharge which the alienation is made. The debt must not be one called into existence by the alienation itself and the mere receipt of the consideration for the mortgage will not constitute such a debt.

Runga Chariar.—The son is a party to the suit. The suit is for a debt contracted by the father.

Subrahmaniya Aiyar, J.—The objection is to your getting a mortgage decree against the son's possession. He was made a party to give him an opportunity to show that the debt is for an illegal or immoral purpose, and he failed to show and your remedy will be in execution.

Srinivasa-sami Aiyangar v. Ponnammal.

Runga Chariar.—A debt is proved, and he failed to prove it illegal or immoral. The Court has got the power to sell the property.

Subrahmaniya Aiyar, J.—Is selling a property in execution of a money decree the same as giving a mortgage decree?

Runga Chariar.—The mortgage debt, not being illegal or immoral, is binding.

Subrahmaniya Aiyar, J.—You must show that there was a debt antecedent to the mortgage debt.

Runga Chariar.—Son cannot set up his vested interest against the father's debt which is not shown to be illegal or immoral. *Kunhali Beari* v. *Keshava Shanbaga*, I. L. R., 11 M., 75.

The consideration received is itself an antecedent debt. I. L. R., 20 C. 328.

Subrahmaniya Aiyar, J.—The debt you refer to, is simultaneous and is not in existence on the date of the transaction.

Runga Chariar.—It does not matter whether it is an antecedent debt or a debt created for the purpose.

They hold in I. L. R., 20 C., that though the debt was incurred at the time, it is an antecedent debt and the mortgage is binding on the son's.

Sivaswami Aiyar.—The *ratio decidendi* in I. L. R , 13 M , 51, is fully applicable to this case. If the receipt of the consideration for a sale is not such a debt as would justify a sale, how can the receipt of consideration for the mortgage constitute such a debt? A mortgage is an alienation just as much as a sale. To put a case which is more clearly analagous to the one in I. L. R., 13 M., 51 ;—suppose a man promises to sell immoveable property in consideration of price already paid and executes an agreement to that purpose. The receipt of the consideration is clearly a debt, but it is part and parcel of the transaction of sale and the sale would not therefore be binding. The case in I. L. R., 20 C., 328, was quoted at the hearing of L. P. A. No. 12 of 1893 and it was in reply thereto that the learned Judges observed that if the debt which is the subject of the suit is to be spoken of as an antecedent debt, merely because it is antecedent to the suit, there would be no case of a debt which would not be antecedent. Our High Court has declined to follow the rule in I. L. R., 20 C.

Srinivasa-sami Aiyangar v. Ponnammal.

The Court delivered the following

JUDGMENT:—As regards the liability of the son's share for the debt of the father as a mere money claim, there can be no question since it is found that the mortgage was for consideration and was not illegal or immoral.

The next question is whether the mortgage is binding on the son in respect of his share. It is argued for the appellant that the father having borrowed money not prior to the mortgage but only at the time of the mortgage, the debt cannot be considered to be an antecedent debt so as to come within the rule in the Privy Council case—*Suraj Bunsi Koer* v. *Sheo Pershad Singh*, I. L. R., 5 C., 148. This is the view taken by this Court in the case in L. P. appeal No. 12 of 1893, and in *Chinnayya* v. *Perumal*, I. L. R., 13 M., 51. The respondent refers us to the case reported in *Khalilul Rahman* v. *Gobind Pershad*, I. L. R., 20 C., 328, in which it was held that even in circumstances, such as those of the present case the mortgage will be enforced against the son's share as well as against that of the father. We do not find any sufficient grounds for differing from the rule hitherto followed by this Court, *viz.*, that in order to justify a sale as a mortgage by a father so as to bind the son's share there must be in fact an antecedent debt, *i.e.*, a debt prior to the mortgage or sale.

We must, therefore, allow the appeal with costs and modify the decree of the lower appellate Court accordingly, but this will not affect the right of the plaintiff to proceed against the son's share in execution of the decree treating it as a mere money decree. We make no order as to costs in the lower appellate Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Davies and Mr. Justice Boddam.

Subrahmanian Chetty and others ... Appellants * (*Plaintiffs*).

v.

Rakku Servai and others ... Respondents (*Defendants*).

Subrah-manian Chetty v. Rakku Servai.

Succession Certificate Act, VII of 1889, S. 4—Suit by undivided son of deceased creditor—Debt of joint family.

A Hindu is entitled to sue on a bond executed in favor of his undivided father, deceased, without the production of a certificate under Act, VII of 1889, provided

* S. A. No. 113 of 1895. 7th January 1897.

the debt for which the bond was executed is a joint family debt. For this purpose it is not necessary that the joint nature of the debt should appear on the face of the bond; it may be admitted or otherwise proved. Subrahmanian Chetty v. Rakku Servai.

Venkataramanna v. *Venkayya*, I. L. R., 14 M., 377, referred to and explained.

The conflict between *Baid Nath Das* v. *Shamanand Das*, I. L. R., 22 C., 143, and *Feteh Chand* v. *Muhammad Baksh*, I. L. R., 16 A., 259, noticed.

Second appeal against the decree of the Subordinate Judge's Court of Madura (West) in A. S. No. 763 of 1894 reversing the decree of the Court of the District Munsif of Sivaganga in O. S. No. 158 of 1894.

This was a suit on a mortgage bond executed by the first defendant in favour of Nachiappa Chetty, the deceased father of plaintiffs 1 and 2, on the 15th November 1870. The third plaintiff was the assignee of the share in the bond of Subrahmanya Chetty, undivided brother of Nachiappa Chetty. Defendants 2 and 5 were the sons of the first defendant and the others were persons in possession under the first defendant. Among other pleas the defendants contended that the suit must fail for want of a succession certificate. The Munsif found on the facts that the debt was the joint family property of Nachiappa Chetty, that it passed by survivorship to plaintiffs 1 and 2, and the assignor of the third plaintiff and that no succession certificate was necessary under the circumstances. On appeal the Sub-Judge held that, as it did not appear on the face of the bond that it was for a joint family debt, a certificate was necessary, and reversed the decree of the Munsif. The plaintiff then preferred this second appeal to the High Court.

V. Krishnaswami Aiyar for appellants.

P. S. Sivaswami Aiyar for 1st and 8th respondents.

The Court delivered the following

JUDGMENT:—As the Munsif found that the debt was a joint debt, and that finding was not disputed in appeal, we must decide following *Venkataramanna* v. *Venkayya*, I. L. R., 14 M., 377, that no succession certificate was necessary. The strict interpretation put on that case by the Subordinate Judge, *viz.*, that it is only when the fact of the debt being a joint one appears on the face of the document, that a certificate is not necessary, has not been adopted by this Court itself which has recognized other proof of the debt being joint beyond what appears on the face of the document,

Subrahmanian Chetty v. Rakku Servai.

It has further been argued that this being a suit on a mortgage for sale of the mortgaged property, the Succession Certificate Act does not apply, and the case, *Baid Nath Das* v. *Shamanand Das*, I. L. R., 22 C., 143, has been relied on in support of the contention. That case, however, is in conflict with the Full Bench case, *Feteh Chand* v. *Muhammad Baksh*, I. L. R., 16 A., 259. We are not called upon to decide the matter now as we find for another reason that no certificate was required. The second appeal must, therefore, be allowed, and we reverse the decree of the lower appellate Court and restore that of the District Munsif. The appellant's costs in this and the lower appellate Court must be paid by the respondents. The time for payment of the mortgage money is extended to three months from this date.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

FULL BENCH.

Present :—Sir Arthur Collins, *Kt.*, Chief Justice, Mr. Justice Shephard, Mr. Justice Subrahmania Aiyar, and Mr. Justice Davies.

Vasudevan Nambudri and others ... Appellants * (*Plaintiffs.*)

v.

Sankaran Nambudri and others . . Respondents (*Defendants.*)

Vasudevan Nambudri v. Sankaran Nambudri.

Malabar law—Karnavans, status of—Decree against karnavan, nature of—Anandravans bound by decree against karnavan in his representative capacity.

A decree made in a suit brought by or against the karnavan of a Nambudri illom or Marumakkatayam tarwad in his representative capacity, and conducted by him honestly and in the interests of the tarwad, is binding on the other members of the tarwad, though they may not have been made parties to the suit.

The rights and duties appertaining to the status of the karnavan of a tarwad discussed.

Ittiachan v. *Velappan*, I. L. R., 8 M., 484; *Sri Devi* v. *Kelu Eradi*, ib. 10 M., 79; *Subramanyan* v. *Gopala*, ib. 10 M., 223, referred to and discussed.

Second appeal against the decree of the District Court of South Malabar in A. S. No. 343 of 1893, confirming the decree of the Court of the District Munsif of Angadipuram in O. S. No. 673 of 1892.

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* S. A. No. 501 of 1895. 21st February 1897.

Vasudevan Nambudri v. Sankaran Nambudri.

The facts of the case appear sufficiently from the judgments of the Court.

J. Adam and *C. Sankaran Nair* for appellants.

V. Krishnaswami Aiyar for *P. R. Sundara Aiyar* for respondents 1 to 13.

This second appeal coming on for hearing before a Division Bench (consisting of Mr. Justice Shephard and Mr. Justice Subrahmania Aiyar) the Court made the following

ORDER OF REFERENCE TO THE FULL BENCH:—Vakils on both sides agreeing to this form of question, we refer it to a Full Bench having regard to the importance of the matter and the conflict of decisions.

Whether in a decree, made in a suit in which the *karnavan* of a *Nambudri illom* or a *Marumakkatayam tarwad* is in his representative capacity joined as defendant and which he honestly defends, is binding on the other members of the family not actually made parties?

On the 7th January 1897, the Court expressed the following

OPINIONS:—*The Chief Justice.*—The question referred to the Full Bench is whether the decree, made in a suit in which the *karnavan* of a *Nambudri illom* or a *Marumakkatayam* tarwad is in his representative capacity joined as a defendant and which he honestly defends, is binding on the other members of the family not actually made parties. I take it that the word "honestly" means that the karnavan acted in good faith and in what he believed to be the interest of the tarwad. The *karnavan* of a Malabar tarwad is, except under certain circumstances, the eldest male member of the tarwad; in him is vested actually all the property, moveable and immoveable, belonging to the tarwad; he manages the property of the tarwad and can invest the money of the tarwad either on loans or other security as he may think fit. He can also grant the land on *kanom* or on *otti* mortgage. No member of the *tarwad* can call for an account of the income, nor can a suit be maintained against him for an account of the tarwad property in the absence of fraud on his part. He can sue in his own name for the purpose of recovering or protecting the property of the tarwad and none

Vasudevan Nambudri v. Sankaran Nambudri.

of his acts in relation to the above matter can be questioned provided he has acted in good faith. He is restrained, it is true, from alienating the lands of the tarwad in his capacity as manager except in certain instances, *e.g.*, when a decree is in course of execution against the *tarwad* property and against the *karnavan* and he alienates such property in good faith, there being no other means available for doing so, and in the case where it is absolutely necessary to do so to pay arrears of revenue. The *karnavan* is not a mere trustee of the property of the *tarwad;* he is the natural guardian of every member within the family, and it was well said by Mr. *Holloway* in appeal suit No. 120 of 1862: "A Malabar family speaks through its head, the *karnavan,* and in Courts of Justice except in antagonism to the head can speak in no other way." It appears that during the time *Holloway, J.*, was in the High Court the proposition that the members of the *tarwad* were bound by the acts of the *karnavan* in cases in which he sued or was sued in his representative capacity was never seriously disputed and the cases cited at the bar do not appear to me to overrule the proposition. I would adopt the view of the power of the *karnavan* as laid down in *Varankot Narayana* v. *Varankot Narayana,* I. L. R., 2 M., 328, and there are many cases quoted by Mr. *Wigram* in his work on Malabar Law and Custom which support the proposition.

I would hold, therefore, that when a *karnavan* sues or is sued in his representative capacity and acts, in the terms of the order of reference, "honestly," the other members of the tarwad are bound by the decision. I answer, therefore, the order of reference to the Full Bench in the affirmative.

The sections of the Code of Civil Procedure cited in the argument do not effect one way or the other.

Shephard, J.—The question raised by the reference is one of considerable importance. Since 1880 it has constantly been discussed in this Court. Different views have been propounded, and it would not be easy to reconcile all the decisions. I propose first to examine these decisions and afterwards to consider the question from other aspects and also with reference to the arguments which are urged against the admission of the principle that a *karnavan,* can properly represent his *tarwad* in suits professedly brought by, or against the tarwad.

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In *Varankot Narayanan* v. *Varankot Narayanan and others*, I. L. R., 2 M., 328 (1880), the senior member of an *illom* had been sued as such for the recovery of land alleged by him to belong to the *illom*. A decree having been passed against him, a junior member of *illom*, alleging fraud, sued for a declaration with regard to the same land as against the plaintiff in the first suit. It was that the junior was properly represented by his senior in the first suit, and that, therefore, having failed to prove fraud he could not succeed in the second suit. In *Kombi* v. *Lakshmi*, I. L. R., 5 M., 201 (1881), a decree for money had been obtained against the *karnavan* and suit was brought by the *anandravan* to set aside the sale in execution of the decree, It does not seem to have been proved that the *karnavan* was sued or sought to be made liable otherwise than in his personal capacity. The Court distinguished the case of a debt from the case of land such as was under consideration in I. L. R., 2 M., 328. It held that the junior members were entitled to a decree on the creditor failing to prove that the debt was properly incurred for the purposes of the tarwad. It was in effect said that if the creditor intended to make the tarwad liable he ought to have made them parties or applied under S. 30 of the Code.

In *Vasudeva* v. *Narayana*, I. L. R., 6 M., 121 (1882), Mr. Justice *Innes*, who was a party to the last decision, expresses the same view again. That was a case in which a member of an *illom*, apparently the eldest, was defeated in a suit brought against him for redemption of certain lands. In the second suit brought by his brother to recover the same land, it was held by *Innes, J.*, that, although no fraud was alleged, the brother was not bound by the former decree. Mr. Justice *Kernan*, who had taken part in the judgment in I. L. R., 2 M., 328, considered that it was unnecessary to decide the question whether the case of a Malabar *tarwad* was an exception from the ordinary rule that all persons sought to be affected by a suit should be made parties to it. The learned Judges agreed that the case was distinguishable from that in I. L. R., 2 M., 328. With all deference I must say that, assuming that the elder brother in *Vasudeva* v. *Narayana* was sued in his representative capacity, I can see no material distinction between the two cases. The circumstance that, in the earlier case,

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the plaintiff alleged fraud and left it to be assumed that otherwise he was bound by the decree is suggestive as indicating the opinion entertained by him and his advisers as to the position of the head of a Malabar family. But I do not understand why, because he failed to prove the alleged fraud, he should not have had relief on the simple ground that he was not duly represented in the former suit if that ground was considered tenable.

It appears to me that the judgment in I. L. R., 2 M., 328, was clearly intended to show that that ground was tenable. In *Thenju* v. *Chimmu*, I. L. R., 7 M., 414 (1884), the two extreme views are stated. First, "a judgment is only binding *inter partes* and the judgment against the *karnavan* is in no case binding on the *anandravans;*" second, "a karnavan is the head and representative of the family, and the judgment against him binds the anandravans unless he was guilty of fraud or collusion." It was not necessary in that case to attempt a reconcilement of the decisions.

In *Haji* v. *Atharaman*, I. L. R., 7 M., 512, it appears to have been assumed that a decree against the *karnavan* for a debt alleged to be the *tarwad* debt was binding on the *tarwad*. There was no actual decision. In *Ittiachan* v. *Velappan*, I. L. R., 8 M., 484, the question came before a Full Bench with reference to decrees for debt. The question stated in the judgment was as follows :—"Under what circumstances a decree passed against *karnavan* of a Malabar *tarwad* will be binding on the other members of the tarwad, who may not have been made parties to the suit, so that a sale in execution will convey the rights of the *tarwad* in the property in execution to a purchaser ? As might have been expected no definite answer was given to this question. The general effect of the observations may in the first part of the judgment seem to be that, in the opinion of the Court, the admitted practice of treating the *karnavan* as a sufficient representative of the *tarwad* was not strictly regular, but that notwithstanding, it must be tolerated without certain bounds. In dealing with the particular cases under reference, the Court treated the circumstance that the *karnavan* had or had not been sued in his representative character as the cardinal point on which to decide whether or not the tarwad was bound by the decree. The next case (*Sri Devi* v. *Kelu Eradi*, I. L. R., 10 M., 79) is of importance, because in diciding it, the Court considered the Full

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Bench decision and acted upon their view of it. At the same time it must be said that, having regard to the facts found by the District Judge, the observations made on the general question of the force of decrees against a *karnavan* were not strictly necessary. The District Judge on appeal held that the *karnavan* had in the first suit in which he was impleaded as defendant fraudulently admitted the plaintiff's title. But the Court decided the case on the ground that apart from fraud the *anandravans* were entitled, notwithstanding the decree, to have the question of title examined and to show that the decree was erroneous in point of fact. They considered that they were precluded by the Full Bench decision from holding that the *anandravans* were bound by the decree against their *karnavan* unless they proved *malā fides* on his part.

The next case (*Subrahmanyan* v. *Gopala*, I. L. R., 10 M., 223) was heard by a Court composed of the same Judges as those who took part in the last-cited case. This case differs from the former cases in the circumstances that the manager of the family had figured as plaintiff in the former suit. It was found that she had sued not on her own account, but on behalf of the *tarwad* and that she had contested the suit honestly and with due diligence. On this finding returned in answer to questions sent down by the Court on the first hearing of the second appeal, the Court dismissed the suit brought by the junior members of the *tarwad*, founding their judgment on the fact that the manager had been the plaintiff in the first suit and thus distinguishing the case in I. L. R., 10 M., 79.

Some other cases were cited, but they have no immediate bearing on the point now under discussion. One negative proposition is clearly established by the cases to which I have referred—a decree made against a *karnavan* is clearly not binding on the *tarwad*, unless he sued or was sued in his representative character. It is also difficult to avoid the admission that the cases justify this further proposition that, in some cases, a decree against the *karnavan* may be binding on the tarwad and unimpeachable save on the ground of fraud. This limited proposition is admitted in the case last cited (I. L. R., 10 M., 223). The distinction there insisted upon, I fail to understand or appreciate. If the *tarwad* may be adequately represented by their *karnavan* in litigation promoted by him, I cannot see why this may not equally be represented by

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him in proceedings which are directed against the *tarwad.* The distinction between the case of the *karnavan* sued for debt and the *karnavan* sued for property is also, I think, one which cannot be maintained. It is suggested in *Kombi* v. *Lakshmi*, I. L. R., 5 M., 205, but since then, does not seem to have been insisted upon. I concede that distinctions founded on the nature of the right or the way in which it comes to be litigated may be material in considering whether the *karnavan* really did represent the *tarwad* and honestly represent it; but otherwise I fail to see how they can be material. There are, it appears to me, only two alternatives. We must either hold that the status of the *karnavan* has nothing in it to make a decree against him binding on the *tarwad,* or that, in all cases in which he is sued or sues in his representative character, the tarwad is bound, cases of fraud or collusion only being excepted. Having regard to the authorities already cited, I do not think we are precluded from affirming this latter proposition. The former proposition it would not be easy to reconcile, with the Full Bench decision which alone is binding on us.

I will now consider the question apart from the recent cases and with reference to the position of *karnavan* as understood in Malabar. I believe there can be no doubt that prior to 1880 the theory that the *tarwad* was fully represented by the *karnavan* was universally admitted. (See I. L. R., 2 M., 328; *ib.* 5 M., 202; Wigram's Malabar Law). It is noteworthy that as long as Mr. Justice *Holloway*, who was intimately acquainted with Malabar Law was in this Court, the theory does not seem to have been questioned. In the Travancore State, I find from a recent judgment of the Court there that it is maintained to the present day, *Narayana* v. *Narayana* (11 Travancore L. R., p. 112). It is unnecessary to repeat at length what has been said in several cases as to the rights and duties of the *karnavan.* He is the manager of the *tarwad* property; he is entitled to possession of it even against the *anandravans;* he is authorised, subject to certain limitations, to alienate the family property and to pledge the credit of the family. He cannot be removed from office at the instance of the junior members and dispossessed of the family property except on proof of gross maladministration. Apart from this, the junior members have no other claims against him except for maintenance. No claim

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for division of the property is admissible (*Eravanni Revivarman* v. *Ittapu Revivarman*, I. L. R., 1 M., 153; *ib.* 2 M., 328; *Tod* v. *Kunhamod Hajee*, I. L. R., 3 M., 176; *Kannan* v. *Tenju*, I. L. R., 5 M., 1). If the *karnavan*, being so placed with regard to the *tarwad*, was for many years prior to 1880, universally regarded as the person through whom the *tarwad* should speak in courts of law and was so treated by the Courts, the remaining question is whether the Code of Civil Procedure forbids us to continue to treat him in the same way. This is a question which ought to be argued without reference to consideration of convenience or expediency, which, however, in my opinion favour the maintenance of the old practice rather than its abolition. The argument used in several of the cases seems to have been that, because the Civil Procedure Code does not provide for the case of *karnavans*, as it does, for instance, for the case of executors, and does contemplate the joinder of all parties interested in the subject-matter of the suit, the *anandravans* of a tarwad cannot be affected by a decree to which they are not parties either actually or constructively under the provisions of S. 30. The general proposition that all persons intended to be prejudicially affected, by a decree ought to be joined as parties to the suit cannot be denied; but there are exceptions for this rule, and the question whether one person represents another is rather a question of substantive law than of procedure One of the classes of exceptions consists of the cases of which *Bissessur Lall* v. *Luchmessur* (I. L. R., 6 I. A., 233) is an instance. Another consists of the cases in which the principle is admitted that the female heiress under Hindu Law represents the estate in such a manner that a decree against her in a suit properly framed may bind the reversioner. These exceptions have been allowed and maintained notwithstanding the provisions of the Civil Procedure Code. The sections of the Code to which we are specially referred are the 30th and the 13th, explanation V. The 30th section is of a permissive character. So far as concerns the principle involved, there was nothing new in the provision. It had been acted on before the Code of 1877 came into force (See *Srikhanti Narayanappa* v. *Indupurum Ramalingam*, 3 M. H. C. R., 226). If it were shown to have been involved in the case of the *karnavan* and his *tarwad*, it might be said that a decree against a *karnavan* could, since the enactment of the Code, be no longer held binding on the *tarwad* unless the procedure prescribed

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by the section were followed. But this is not so, and I do not think it can properly be said that a *karnavan* and his *anandravans* have "the same interest" in a suit brought by or against the *tarwad*. The interest of the former with his right of management and possession, and his obligation to maintain the junior members is surely not identical with the interest of a junior member who has a claim for maintenance only. The only contention in favour of the view that the *karnavan* represents the *tarwad* rests on the fact that he is in a position of authority having obligations and duties to perform for the discharge of which superior rights in the *tarwad* property are conferred upon him. With regard to section 13, explanation *V*, if it has any application to the case of a Malabar *tarwad*, it rather supports the view that the *tarwad* may be bound by a decree against the *karnavan*, *bona fide* litigating on its behalf. I am disposed to agree with *Kernan, J.*, in thinking that the explanation refers alike to claims made by a defendant and claims by a plaintiff. The conclusion at which I arrive is that the Code of Civil Procedure does not prevent our giving effect to the theory of the *karnavan's* representative character. I cannot help thinking that learned Judges have been induced to discountenance the theory, on the ground that the interests of the *tarwad* require that all their members should be joined in suits concerning their property or obligation. It was observed in some of the cases that to allow the *karnavan* to represent the *tarwad* in suits would practically amount to allowing him to alienate *tarwad* property indiscriminately. No doubt, the remedy by suit impeaching the decree against their *karnavan* on the ground of his fraud or collusion would not afford the *anandravans* a complete indemnity against the possible misconduct of the *karnavan*. But the inconvenience resulting is, I think, more than counterbalanced by the evil consequences which have resulted from the departure from the old practice. The result has been that, although a man may have obtained a decree for a debt or for property against the *karnavan* and some of his *anandravans*, he has been exposed to successive suits by the remaining members of the *tarwad*. It is always open to some unconsidered infant to re-open the litigation and insist on having the whole question retried. The rule of impartibility, which prevails according to Malabar law, renders the consequences of an omission to join all the members of the *tarwad*, if they are to be

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deemed necessary parties, much more serious than it is in a similar case under the ordinary Hindu Law. Whereas, according to the latter, the creditor or the purchaser might, at least retain under his decree against the manager, the share of that manager in the family property; in Malabar he is deprived even of that consolation when the Court holds that a junior member of the *tarwad* may re-open a litigation which has been fairly conducted by his *karnavan* and is persuaded to upset the former decree. In such a system it is not astonishing that a rule making the *karnavan* the exclusive representative of the tarwad should find a place.

For these reasons I am of opinion that the question must be answered in the affirmative.

Subrahmania Aiyar, J.—I have also arrived at the same conclusion, and in my opinion, that is the conclusion to which the principle governing the case leads, there being nothing in the Code of Civil Procedure to preclude effect being given to that principle. The question here turns upon the peculiar characteristics of a Malabar family and the unique position which its *karnavan* holds. The family property is not liable to partition except with the consent of all; the right of the members, other than the *karnavan*, being practically limited to claim maintenance and to prevent the *karnavan* from wasting or improperly alienating the family property, and the title to hold possession of the estate and to receive and expend its income is vested in the *karnavan*, not by sufferance of the other members, but of right, which is indefeasible so long as he exercises his functions without injury to the family. Therefore, according to the substantive law to which he is subject, a *karnavan* is necessarily the natural representative of the family in all matters concerning it as between it on the one hand and outsiders on the other.

The question is whether in litigation also, when it concerns the family, a karnavan is not entitled to represent all the other members so as to bring cases like the present within the exception to the general rule requiring all persons materially interested in the subject of a suit to be made parties to it, *viz.*, even those not actually before the Court are bound by the judgment given in a suit if their interest was sufficiently represented therein. Now it is conceded that when a *karnavan* sues on behalf of the family, he fully represents all its other members and an adjudication therein, if

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there is no fraud or collusion, is binding on the whole family. *Subramanyan* v. *Gopala* (I. L. R., 10 M., 223). It is obvious that in such cases it is not possible to maintain any other view. For the entire executive authority being exclusively vested in the *karnavan* it is not open to the party sued by him, to raise any objection to the action on the ground of the misjoinder of the other members. *Byathamma* v. *Avulla* (I. L. R., 15 M., 19) A defendant in that position cannot, in common fairness, be allowed to be sued again and again by each and every member of the family after a suit instituted by a *karnavan* had been properly tried and adjudicated upon. By parity of reasoning then, it follows that a karnavan can be sued on behalf of the family. It is difficult to see how this conclusion can be avoided unless the argument of the defendant based on the provisions of the Civil Procedure Code were correct.

The argument seems to be that only when the special procedure prescribed by section 30 has been adopted, the members of a family, not actually parties to the suit, are bound by the decision pronounced in it, but not otherwise. Now, it must be remembered that section 30 provides only for that class of cases in which, owing to the circumstance that the persons interested are too numerous to be all conveniently brought before the Court, and therefore the rigorous application of the general rule as to parties would work injustice, the rule has, as pointed out by the Lord Chancellor in *Mozley* v. *Alston* (1 Ph. at pp. 798 and 799;——also *Richardson* v. *Hastings*, L. J. 13 Eq. at p. 144) been relaxed in comparatively, modern times. It has also to be remembered that the representative under that section *is constituted and appointed by the Court in the suit*. But there are instances where, even though the difficulty with reference to the application of the general rule has nothing to do with the fact that the persons interested are numerous, yet the law does not allow, apart from statute, certain persons to prosecute or defend suits in their representative capacity, *e.g.*, Hindu widows with reference to reversioners; other persons having an estate, analogous to that of a Hindu widow with reference to those entitled to take after such qualified owners, and so on. In the cases last mentioned the limited owners possess the representative capacity to sue or defend by virtue of their position. This as already shown is eminently true in the case of the *karnavan*. Consequently he does not require the aid of section 30 to be a representative, but has the

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inherent right to act as such, provided, of course, there is in the particular case no conflict between his own interest and that of the family.

Nor does section 13, the only other provision relied upon, affect the validity of the conclusion arrived at. If the present case falls within explanation *V*, that explanation fully sustains the view taken, since, with all deference to the opinion of *Innes*, J., in *Vasudev* v. *Narayana* (I. L. R., 6 M., 121), I think the explanation is certainly applicable to claims by a defendant as well as to those by a plaintiff. But if that explanation does not apply, the case is one not strictly covered by any other part of the section. And, as the section is not exhaustive as to *res judicata*, I think it does not affect the correctness of the view taken here. Therefore, unless it is shown in the words of *Jessel*, M. R., "fraud or collusion or anything of that sort, or that the Court was cheated into believing that the case was fairly fought or fairly represented when in point of fact it was not." (*Commissioners of Sewers of the City of London* v. *Gellatly*, 3 Ch. D, at p. 616). A decision in a suit, defended by a *karnavan* in his representative capacity, must be held to be binding upon all those represented by him.

The rule governing the present case being thus clear, arguments against it founded on expediency have no force. If it be said that to recognize the right of a *karnavan* to represent his juniors in litigation would prove detrimental to the welfare of Malabar families it must be admitted it would be equally so in cases in which a *karnavan* sues as when he *defends*. Yet in the former case the objection has not been considered good enough to hold that junior members are not bound by a decision obtained in the suit by the *karnavan*. How then can the argument prevail in the latter case? No doubt, in particular instances, it is possible and not improbable that junior members might find themselves unable to establish fraud, collusion or the like on the part of the *karnavan*. But I shall have no doubt that the hardship, likely to be so caused, will be small indeed compared with that which would result from answering the question before us in the negative; since experience shows that, in the large majority of cases, the attempts made to re-open litigation, once concluded after real and genuine contest, are made by the same parties, the names of persons (possibly of those who had been fully cognizant of and who had acquiesed in

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the *karnavan's* management of the previous litigation) who, unfortunately for the successful party, had not been actually impleaded, being used for the promotion of such subsequent suits. No doubt representative litigation of the kind under notice is attended with some degree of difficulty. The difficulty however may to some extent be met by a judicious exercise of the discretion vested in the courts in the matter of adding parties. But the difficulty cannot afford any justification for discarding the principle applicable to such cases. A departure from it, in some of the decisions of this Court which have been fully considered by my learned colleague *Shephard*, J., and which I therefore refrain from discussing, has, I am afraid, tended to foster unjust and vexatious litigation which can, I think, be stopped to a considerable degree by again enforcing the principle accepted and uniformly acted up to 1880.

I concur therefore in answering the question referred to in the affirmative.

Davies, J.:—I was at first disposed to adopt the view that all members of the *tarwad* ought to be impleaded either individually when few in number or under the provisions of section 30 of the Civil Procedure Code when numerous, for the simple reason that this course would have the effect of preventing any further litigation in connexion with the same subject matter. But now having regard to the representative character which the *karanvan* undoubtedly holds in all other affairs connected with the *tarwad*, it seems to me that if we overlooked that character in our courts of law we should be unjustly derogating from his status.

Moreover, the only litigation that would be possible upon the judicial recognition of his representative character would be confined to actions founded in fraud on his part. The inconvenience caused thereby would in my opinion be far less than what would follow from an inflexible rule requiring that in every case in which a *tarwad* was concerned all its members should be made parties, entailing in nine cases out of ten needless trouble and expense. I, therefore, also concur in answering the question in the affirmative.

[In accordance with the opinion of the Full Bench, a Division Bench consisting of Mr. Justice Shephard and Mr. Justice Subrahmania Aiyar concurred with the District Judge and dismissed the appeal, but without costs.]

IN THE PRIVY COUNCIL.*

[ON APPEAL FROM THE COURT OF THE RECORDER OF RANGOON.]

Present:—Lord Watson, Lord Davey and Sir Richard Couch.

Aga Mahomed Jaffer Bindaneem ... ... *Appellant*,

v.

Koolsom Bee Bee and others ... ... *Respondents*.

Aga Mahomed Jaffer Bindaneem *v.* Koolsom Bee Bee.

Gift, incomplete—Transfer of deposit notes "not transferable"—Mahomedan law—Widow—Maintenance—Commission to executor, a legacy—Covenant implied to pay rent—Rent by person occupying as caretaker.

A testator some four days before his death being then indisposed (but not in contemplation of his early death) handed to his wife certain deposit notes of the Bank of Bengal, marked "not transferable" and added "After taking a bath I will go to the bank and transfer the papers to your name." The testator did not afterwards transfer the notes in the Bank or do any act to complete his wife's title.

Held: that the gift was incomplete and that no legal effect can be given to it; that the mere handing of the notes to the wife did not amount to a transfer of the debt and that the other evidence amounted only to an intention to give.

A Mahomedan by his will made various dispositions of his property, appointed his nephew his executor and trustee, and directed that his executor and trustee should be entitled to a commission of three per cent. on the aggregate value of his entire property.

Held: that the commission, though given by way of remuneration, was but a gratuitous bequest and nothing more than a legacy to the executor and can consequently be paid only out of the one-third part of the testator's estate which he could validly bequeath.

Under the Mahomedan law a widow is not entitled to maintenance out of her husband's estate in addition to what she is entitled to by inheritance or under his will.

Generally where one occupies the house of another there is an implied covenant to pay an occupation rent. But this implication can be rebutted by circumstances, *e.g.*, by showing that the house was lent to the occupier, or that he was in it as a caretaker.

A Mahomedan woman was living with her husband in his house. The husband died leaving a will in which he had mentioned his wife as a residuary legatee. After her husband's death the woman continued to live in the same house and the executors under the will did not give her any notice that she would be charged with an occupation rent.

Held: that she was occupying the house as a caretaker and that she could not be charged with rent for the period of her occupancy.

A Mahomedan widow cannot, by the Shia law, take any share of inheritance in the land on which buildings stand as well as in the value of the buildings.

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* 7th April 1897.

Aga Mahomed Jaffer Bindaneem v. Koolsom Bee Bee.

The facts of the case will appear from the judgment.

Mayne for appellant.

Branson for respondents.

The judgment of their Lordships was delivered by

LORD DAVEY:—This appeal and cross-appeal from the Court of the Recorder of Rangoon deal with questions which have arisen in the administration of the estate of Hadji Hossain Bindaneem, a Mahomedan of the Shia sect. The testator died in February 1890, leaving one widow, Koolsom Bee Bee (respondent in the principal appeal and appellant in the cross-appeal), and no children.

The contents of the will, so far as material, may be shortly stated. The testator appointed his nephew, Aga Mahomed Jaffer Bindaneem (the appellant in the principal appeal), his sole executor and trustee, and directed him to sell his property, and deduct from the proceeds of sale the costs and charges and a commission of three per cent. He devoted one-fifth part of the remainder (called Khoons) and a sum of Rs. 3,000 to religious purposes, and directed his executor and trustee to divide the remainder after deduction of the said sum of Rs. 3,000 and Rs. 2,500 due to his wife Koolsom Bee Bee for dower into three equal shares and to retain one-third share, and divide the remaining shares between his heirs, who were his said wife and brother, Aga Abdool Hadji Bindaneem, in the shares and proportions in which they would be entitled to the same according to Mahomedan law, and made a particular provision of the reserved one-third share. The testator declares that his executor and trustee should have power to charge a commission of three per cent. on the proceeds of sale of his property, real and personal, and cash.

Part of the testator's property consisted of land with buildings on it.

Several questions were raised on taking the accounts of the executor, four of which are submitted for decision in these appeals.

1st.—Whether the commission of three per cent. to the executor, and trustee is payable out of the entire estate or only out of the one-third which alone the testator could bequeath by his will?

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2nd.—Whether the widow was entitled to maintenance for any and what period after the testator's death ?

3rd.—Whether she ought to be charged with an occupation rent for the time during which she continued to reside in the testator's house after his death ?

4th.—Whether the widow can by Shia law take any share of inheritance in the land on which the buildings stand as well as in the value of the buildings.

The widow also claimed adversely to the estate to be entitled to a sum of Rs. 30,000 owing to the testator on deposit notes of the Bank of Bengal, which she alleged the testator had given to her on the Monday preceding the Friday on which he died.

To deal with the last-mentioned question first. The deposit notes signed by the Agent of the Bank are in the form of receipts from the testator of the sum mentioned in them as a deposit bearing interest at the rate mentioned to remain till notice of twelve months on either side expires. They contain in the margin the words "not transferable," and are not in a form which would entitle the bearer of the notes to the debts created thereby as transference thereof. The respondent Koolsom Bee Bee in her evidence stated that on the day in question the testator being then indisposed (but not apparently in contemplation of his early death) handed her the notes with certain formalities and added "after taking a bath I will go to the Bank and transfer the papers to your name." Her story to this extent is confirmed by two witnesses, who said they were present. The testator never did transfer the notes in the Bank or do any act to complete Koolsom Bee Bee's title.

The learned Recorder has expressed doubts as to the truth of the story told by Koolsom Bee Bee and her witness, but he has also held that even, if her evidence be accepted, the gift was incomplete and that she is not therefore entitled to the money on deposit.

As their Lordships entirely agree with the Recorder on the latter point, it is unnecessary for them to express any opinion on the value of the evidence. It is quite clear that the effect of handing the notes was not to transfer the debts or to give the widow the dominion over them or enable her to recover the moneys secured

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by the notes. At most, the evidence shows an intention to make such a transfer, but the gift is incomplete, and no legal effect can be given to it. There is no question here of a *donatio moritis causa* in the English sense even if such a mode of passing property were known to the Mahomedan law.

Their Lordships also agree with the learned Recorder that the executor's commission can be paid only out of the one-third part of the testator's estate which passed by his will. It is given, no doubt, by way of remuneration, but it is a gratuitous bequest and nothing more than a legacy to the executor, and certainly not in any sense debt.

The learned Recorder has decided that the widow is entitled to maintenance at the rate of Rs. 150 *per mensem* for one year after the testator's death, and he has done so on the authority of a passage of the Koran quoted by Mr. Justice Ameer Ali in his work on the Personal Law of Mahomedans, on which the text-writer makes the observation that several jurists have held that a wife has a right to be maintained out of her husband's estate for a year independently of any share she may obtain in the property left by him. Unfortunately the writer does not give any references in support of his statement and counsel have not been able to furnish their Lordships with any. On the other hand the Hedaya (Book IV, ch. XV, sec. III) says expressly "maintenance is not due to a woman after her husband's decease" and gives reasons for so holding. The Imameea (Baillie, p. 170) after saying that it would seem that after the death of her husband the widow has no right to a residence except in the single case of her being pregnant, says "A widow has no right to maintenance even though she be pregnant."

Their Lordships on these authorities must hold that a Mahomedan widow is not entitled to maintenance out of her husband's estate in addition to what she is entitled to by inheritance or under his will. They do not care to speculate on the mode in which the text quoted from the Koran, which is to be found, Sura II, vv. 241-2, is to be reconciled with the law as laid down in the Hedaya, and by the author of the passage quoted from Baillie's Imameea. But it would be wrong for the Court on a point of this kind to attempt to put their own construction on the

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Koran in opposition to the express ruling of commentators of such great antiquity and high authority.

The executor in his accounts charged the widow with an occupation rent for the period of eleven months during which she continued to occupy the testator's house after his death. She objected to the charge on the ground that she had never contracted to pay a rent and the learned Recorder has decided in her favour. Their Lordships do not disagree with the Recorder. It is quite true that when one occupies the house of another with his permission, there is *primâ facie* an implied contract to pay an occupation rent. But this implication may be rebutted by showing the circumstances under which possession was taken, *e.g.*, that the house was lent to the occupier, or that he was a caretaker. In this case the widow's occupation is referable to the previous occupation by her husband and herself, and as one of the heirs and one of the residuary legatees, she had an interest in the house (apart from the land). No notice appears to have been given her that she would be charged a rent, and their Lordships think that in the circumstances of the case they cannot imply a contract on her part to pay a rent, but they must treat her as having occupied the house until sale on behalf of herself and the other parties interested as caretakers.

There only remains the question raised on the widow's behalf that she is entitled to share in the land on which the buildings stand as well as in the value of the buildings themselves. The argument urged by Mr. Branson was that the text from Baillie's Imameea, p. 295, quoted by the learned Recorder, refers only to agricultural land, and that a childless widow is, according to the proper construction of that text, entitled by Shia law to share in land forming the site of buildings. The argument is characterized by novelty and boldness. It is unsupported by any authority, and is contrary to the accepted doctrine on the subject. Their Lordships have no hesitation in agreeing with the learned Recorder in rejecting it.

Their Lordships, therefore, will humbly advise Her Majesty that the final decree of the learned Recorder, dated the 14th September 1893, be reversed so far as it decrees " 7. That the plaintiff Koolsom Bee Bee is entitled to be paid maintenance out of the estate

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at the rate of Rs. 150 per month for twelve months," and instead thereof it be declared "that the plaintiff Koolsom Bee Bee is not entitled to maintenance out of the estate after the date of the testator's death" and in other respects that the decree be affirmed. As the appeal of the appellant Aga Mahomed Jaffer Bindaneem has partly failed and partly succeeded, there will be no order as to the costs of that appeal. The appellant Koolsom Bee Bee must pay to Aga Mahomed Jaffer Bindaneem the costs of her appeal. The other respondents in each appeal have not appeared, and there are no costs.

IN THE PRIVY COUNCIL.*

[ON APPEAL FROM THE CALCUTTA HIGH COURT.]

Present:—Lord Watson, Lord Hobhouse, Lord Davey and Sir Richard Couch.

Debi Pershad Singh and another ... *Appellants.*

v.

Joy Nath Singh and others ... ... *Respondents.*

Debi Pershad Singh v. Joy Nath Singh.

Riparian proprietors, rights of—Natural streams, rights in—Diversion of water—Fair and reasonable use—Pleadings, defect of allegation.

An upper riparian proprietor has no right to dam back a natural stream running through his land, and take from it as much water as he likes, leaving only the surplus, if any, to the use of the proprietors below. Such a right is not a natural right and can only be acquired.

The natural right of an upper riparian proprietor is to take and use for the purpose of irrigation so much only of the water of the stream as can be abstracted without materially diminishing the quantity which is allowed to descend for the use of riparian proprietors below, and without imparing its quality. The quantity which can thus be abstracted depends upon various circumstances, chief among them being the size of the stream and the proportion which the water abstracted bears to its entire volume.

The appellants placed within the limits of their own estate a dam across a natural stream flowing through their estate on to that of the respondents and diverted the water into a new channel leading to a *tal* or reservoir of their own. The respondents destroyed this dam and the appellants then brought the present suit for a declaration "that the plaintiffs are entitled to carry the water of the river to their reservoir by placing bunds at any part of the river within the estate of the plaintiffs and that the defendants have no right to obstruct and oppose them." The plaint contained no averment or proof either as to the size and character of the dam or as to the quantity

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* 7th April 1897.

which it had the effect or diverting and did not state that the dam did not materially diminish the flow of the stream.

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Held: (confirming the decision of the High Court at Calcutta) that the right as alleged and claimed in the plaint was excessive and could not be allowed.

This was an appeal from a judgment of the High Court of Calcutta of May 19, 1893, reversing the decree of the Subordinate Judge of Shahabad, and dismissing the appellants' suit with costs.

The facts of the case appear sufficiently from the judgment of their Lordships.

J. D. Mayne for appellants.

A. Phillips for respondents.

The judgment of their Lordships was delivered by

LORD WATSON.—The appellants are the proprietors of Mehal Ramgurh, including three mouzahs though which there runs a hill stream or nullah, there known as the Kudra, its course being from south to north. Before entering Ramgurh, from the south, the Kudra intersects the adjoining mouzah of Chikhuria, belonging to the Maharajah of Dumraon; and, on the north, it passes from Ramgurh into mouzahs Hata, Khaja and Narainpore, which are the property of the respondents in this appeal.

The appellants at one time used, for purposes of irrigation, water diverted from the Kudra, which was stored in a *tal* or reservoir in Ramgurh, before being distributed over the surface of the land. The diversion was made within mouzah Chikhuria, by the erection of a bandh or dam upon the bed of the stream belonging to the Maharajah of Dumraon, from which the water was conducted by a channel or cut, passing at first through the lands of Chikhuria, to the appellants' *tal*. The bed of that channel or cut was on a higher level than that of the surface of the water of the stream in its ordinary flow. Before the end of the year 1884, the appellants made some alterations upon the structure of the dam, in consequence of which two separate actions were brought against them, concluding for its removal, one by the present respondents, and the other by the Maharajah of Dumraon.

These actions depended before the Munsif of Sasseram, who heard the cases together, and made the following order applicable

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to both:—"That a modified decree be passed in both these suits for the removal of the bandh in dispute, it being decided that the bandh is recent, and that the plaintiffs are entitled to have it removed; that both the plaintiffs and defendants in both suits are entitled to irrigate their lands in their mouzahs from the water of the *baha*; that the channel to Ramgurh *tal* is also old and the plaintiffs are not entitled to have this filled up; that the defendants and the plaintiffs in suit No. 339 (*i.e.*, the Maharajah's suit) are entitled to erect temporary bandhs at the place in (torn), but not so as to (torn) the flow of water downwards to the detriment of the plaintiffs and other proprietors lower down." Appeals were taken against that decree to the Subordinate Judge of Shahabad, and thence to the High Court, with the result that, as between the parties to this appeal it was affirmed, and, as between the present appellants and the Maharajah of Dumraon, was materially altered, it being finally adjudged that, in a question with him, the appellants have no right to construct a dam within the mouzah Chikhuria for the purpose of diverting the water of the Kudra into the old channel leading to their *tal*.

These litigations were not finally disposed of until November 1887. Some time thereafter, the appellants placed a dam across the Kudra within their own property, and made a new channel leading through it, from the stream to their reservoir. The dam was destroyed by the respondents; and the appellants, in consequence, made an application against them to the Criminal Court, which was rejected on the 5th December 1888, upon the ground that they ought to establish their rights in the Civil Court. The present suit was, in consequence, brought before the Court of the Munsif at Sasseram, on the 9th January 1889.

It is necessary to examine the terms of the plaint, because the rights therein asserted, and the remedies craved, form the main grounds of the judgments of the High Court, of which the appellants complain in this appeal.

The plaint, in substance, concludes for a declaration of the appellants' right, in terms which necessarily involve the illegality of the respondents' action in interfering with their dam; and that declaration is followed by a prayer for an injunction against the respondents committing these or similar acts in the future, and

also for pecuniary damages in respect of the injury which the appellants have sustained. It contains six conclusions in all. The first, which is the basis of all the rest, is to have it declared "that the plaintiffs are entitled to carry the water of the river to their *tal* at Ramgurh by placing bandhs at any part of the river within the estate of the plaintiffs, and that the defendants have no right to obstruct and oppose the plaintiffs in the construction of any bandh on the bed of the river, at any place above their estate, and the acts of the defendants complained of above are illegal." The second conclusion is for an injunction against any repetition of the respondents' illegal acts. The next two conclusions are for damages, the third being in respect of the injury already occasioned by the destruction of the bandh, and the fourth for loss to be sustained until the appellants shall be enabled, under the sanction of the Court, to convey water from the river to the Ramgurh *tal*. The fifth is for such other relief "as appears to the Court fit and proper for free flow of water from the river to the *tal*, for irrigation;" and the sixth and last relates to the costs of suit.

The right of a riparian proprietor to divert and use water for the purpose of irrigation is certainly not understated in the plaint. The right, claimed by the appellants in the first conclusion, is not less broadly asserted in the body of the plaint, and is neither more nor less than a right on the part of an upper proprietor to dam back a river running through his land and to impound as much of its water as he may find convenient for the purposes of irrigation, leaving only the surplus, if any, for the use of proprietors below. In the absence of a right acquired by contract with the lower heritors, or by prescriptive use, the law concedes no such right. The common law right of a proprietor, in the position of the appellants, is to take and use for the purpose of irrigation, so much only of the water of the stream as can be abstracted without materially diminishing the quantity which is allowed to descend for the use of riparian proprietors below, and without impairing its quality. What quantity of water can be abstracted and consumed, without infringing that essential condition, must in all cases be a question of circumstances, depending mainly upon the size of the river or stream, and the proportion which the water abstracted bears to its entire volume.

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The plaint contains no statement in regard to the character of the dam which is alleged to have been illegally destroyed by the respondents, or in regard to the quantity of water which it had the effect of diverting from the channel of the Kudra into the Ramgurh *tal;* and there was no issue adjusted to try the question whether the bandh destroyed was one which the appellants were legally entitled to construct. Yet it is obvious that, until that question had been raised and determined in the appellants' favour, no injunction could issue, and no decree for damages could be made against the respondents. The plaint is likewise silent in regard to the size and character of the bandh or dam which the appellants claim the privilege of erecting within their own lands of Ramgurh, under the sanction of the Court; and as to the quantity of water which by means thereof they would be enabled to divert from the Kudra, without making any provision for its return to the stream. They appear to have ignored the fact that their right to take the water, and the quantity they were entitled to take, were matters inseparably connected with each other, and were mainly dependent upon the very considerations which they have omitted to state; and they relied upon a claim of right which, on the face of it, is extravagant. The unfortunate result has been, that none of the issues adjusted for the trial of the cause (with the exception possibly of those relating to the law of limitation, for which there does not appear to have been any foundation in fact) can, in the opinion of their Lordships, admit of a satisfactory, if any, answer, without an investigation into facts, which have neither been averred, nor made the subject of proof.

It is a somewhat singular circumstance that each of the parties should have relied, with equal confidence, upon the decrees obtained in the previous suits with reference to the Chikhuria dam, as *res judicata* in their favour. The decree obtained by the Maharajah of Dumraon is *res inter alias,* and cannot affect the present case. In the suit at the instance of the present respondents it was, no doubt, expressly found, that both parties to this appeal were entitled to take water from the Kudra for the purposes of irrigation. In neither of these suits does there appear to have been any issue taken, or proof led in regard to the actual quantity of water diverted into the appellants' *tal,* by means of the Chikhuria bandh. The

appellants can take no benefit from the finding, as supporting the claim put forward by them in this suit, because it was qualified by the condition that they were not entitled to interfere unduly with the flow of the stream, in prejudice of the respondents and other lower proprietors. As for the finding that the respondents were entitled to take water for the irrigation of their lands, it was plainly outside of and irrelevant to the case which the learned Judge was deciding. The existence of their right to take water for such a purpose, and, if existing, its extent, could not be determined, except in a question with proprietors of riparian lands below their mouzahs.

The Munsif, after taking evidence, gave judgment on the 31st December 1889. He referred to authorities showing that the law of India, in relation to water rights, does not differ from that of England; and he affirmed, in their Lordships' opinion correctly, that a riparian proprietor who desires to use the water of a stream flowing in a defined channel, must not so use it as to destroy or render useless, or materially diminish or affect, the application of the water by riparian owners below. Accordingly, he declines to affirm the first conclusion of the plaint, and did not deal with the injunction or damages craved; but he found that the appellants were 'entitled to a fair and reasonable use and share of the water of Kudra nullah, so as not to interfere with or substantially diminish the supply of water to the defendants holding lands below." That finding, considered by itself, appears to their Lordships to be unexceptionable, although it does not affirm any proposition which is to be found in the appellants' pleadings. The learned Judge then proceeded to make an order in these terms:—"At the spot where they (*i.e.*, the appellants) propose to cut (the land) or make a channel, they may make a permanent or temporary construction, some masonry or earthwork, either on the bank or across the bed of the stream or on both, but so as not to completely dam it up, whereby they can get a quantity not exceeding a fourth of the whole volume of the water of the nuddi which comes down to that point." To that order, three conditions were attached: (1) that the position of the dam and channel might, if necessary, be shifted, within the limits of Ramgurh; (2) that if after making an estimate, if possible, of the whole volume of water coming down the stream, the obstruction of a fourth would not keep a sufficient

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quantity available for the proprietors below, it could be reduced to a fifth; and (3) that, when the order came to be executed, instructions might be given to an Engineer of the Irrigation Department, selected for that purpose, as to varying and altering the width or depth of the stream, and similar details.

On appeal by the respondents from that decision, it was confirmed by the Subordinate Judge of Shahabad, with this modification, that instead of allowing the appellants to take one-fourth or, as it might be, one-fifth of the volume of the Kudra, by means of a permanent bandh, the learned Judge ordained that the appellants should have to erect and maintain a temporary dam across the bed of the stream, for seven days and no more of each lunar month, carrying the entire water of the stream into the Ramgurh *tal* during that period, the whole of the free flow being allowed to go to the lower riparian proprietors during the remaining twenty-one days of the month. The learned Judge observed:—"The Munsif's order may be theoretically good; but it will be impossible so to regulate the flow as to bring only one-fourth of the water to plaintiffs and no more, and at the same time keep the flow downwards unimpeded."

There is considerable force in the observation of the Subordinate Judge; but it appears to their Lordships that the main objection to the decree of the Munsif consists in this, that the proportion of the entire water of the Kudra which he authorized the appellants to appropriate for irrigation purposes, was fixed by him without any evidence, and without inquiry. The modification of his order made by the Subordinate Judge is open to the same criticism, and is, from a legal aspect, more objectionable than the order which it qualifies. The legal right of the lower riparian owners is to have the water of the stream transmitted to them continuously and without interruption, and without any substantial diminution in volume, their right being only subject to the qualification that an upper proprietor may, for purposes which the law regards as legitimate, withdraw from the stream as it passes along his lands, so much of its stream as will not materially affect its downward flow, or impair their uses of it.

The appellants and the respondents both appealed against the decision of the Subordinate Judge; and, on the 19th May 1893, a

Divisional Court, consisting of Mr. *Justice W. Macpherson* and Mr. *Justice Gooroo Dass Banerjee*, dismissed the appellants' appeal, allowed the appeal of the respondents and dismissed the suit with costs. Their Lordships cannot hesitate to concur in the judgment of the High Court. The appellants' suit is based upon the assertion of a legal right which is plainly untenable; and unless it were affirmed, they could not obtain the remedies of injunction and damages, which are of the essence of their action. If their right to maintain the bandh had been supported upon the ground that the amount of water which is diverted into their *tal* did not materially diminish the flow of the stream, and was, therefore, no more than they were entitled to, the Court might have been enabled to determine what proportion of the water of the Kudra they could legally divert for purposes of irrigation without prejudicing the rights and interests of the respondents; and also in what manner and by what means that amount was to be withdrawn. In the present shape of the record, it is impossible to arrive at a satisfactory decision upon those points, which were dealt with, without evidence or inquiry, by the learned Judges of the first and second Courts.

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Their Lordships will, accordingly, humbly advise Her Majesty to affirm the judgment appealed from. The appellants must pay to the respondents their costs of this appeal.

Appeal dismissed.

IN THE PRIVY COUNCIL.*

[ON APPEAL FROM THE CALCUTTA HIGH COURT.]

Present:—Lord Watson, Lord Hobhouse, Lord Davey and Sir Richard Couch.

Raja Modhu Sudon Singh ... ... *Appellant.*

v.

Rooke ... ... *Respondent.*

Hindu law—Widow's power of alienation—Election by reversioner to confirm widow's alienation—Putni lease granted by widow voidable—Receipt of rent, effect of.

Raja Modhu Sudon Singh v. Rooke.

An alienation by a Hindu widow is not altogether void beyond her life-time, but only voidable at the option of those who claim to take after her.

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* 7th April 1897.

Raja Modhu Sudon Singh *v.* Rooke.

A Hindu widow came into possession of her husband's estate in 1847. In 1864 she granted a putni lease to the respondent at an annual rent of Rs. 475. The widow died in 1881, and thereafter, the appellant—heir to the estate after her—sued to set aside the lease. It was proved in the case that after the widow's death the respondent for some years paid money as rent due under the putni lease to the appellant, which the latter accepted. There was no evidence on the part of the appellant to explain away the effect of the receipt of this rent.

Held: that the lease by the widow was not void but only voidable at the option of the appellant;

that the receipt of rent *qua* rent was *prima facie* proof that the appellant elected to treat the lease as valid; and

that in the absence of any evidence on the part of the appellant explaining away the legal effect of the receipt of the rent, the suit ought to be dismissed.

The facts of the case appear from the judgment.

Crackenthorpe, Q. C., and *Mayne* for appellant.

C. W. Arathoon for respondent.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH.—The suit in this case was instituted to recover possession of two villages, part of the zemindari of the Pandra Raj, in the district of Manbhoom. The appellant is the heir of Raja Sagur Narain Singh, the former owner of it, who died in May 1847, leaving his widow Rani Hingan Kumari and two brothers. The right of the widow to succeed him was disputed by the brothers, and she had to bring a suit to recover possession of an 8-anna share of the zemindari. In this she was successful, and, having obtained possession of the estate, she remained in possession of it till her death in December 1881. The appellant then took possession, and in March 1882, a suit was instituted against him by the younger of the brothers claiming as the heir of Raja Sagur Narain Singh. It was dismissed by the District Court in April 1887, and this decree was confirmed by the High Court on the 25th June 1889. In July 1882 a receiver was appointed to take charge of the estate, and he continued to be in charge of it until the 3rd of May 1887, when he was discharged.

On the 26th January 1864, the widow granted a putni lease or settlement of the two villages to the respondent at an annual rent of Rs. 475, and upon receipt of a bonus of Rs. 2,525. The appellant in his suit asked to have his putni set aside on the ground that

the widow had no legal reason or necessity for making it. This was the subject of one of the issues which has been found in the appellant's favour by the District Court and the High Court. The question upon which the Courts have differed arises from the receipt of rent by the appellant after the widow's death. For three years the rent was paid to the receiver. The important payment is of the rent due for the native years 1295 and 1296 (1887—1890), after he was discharged.

On the 10th of September 1890, the respondent presented a petition in the Court of the Munsif of Ranigunge under Act, VIII of 1835, in a rent suit in which the respondent is called "First party" and the appellant "Second party." It is as follows:— "The representation of Mr. E. G. Rooke, of Jore Janoki * * * is this:—That I am in possession on putni right of mouzah Naharjore and mouzah Amkura, in thana Assensole, pergunnah Pandra, under the said second party, at an annual rent of Rs. 475. My officer repeatedly went to pay the aforesaid rent for the years 1295 and 1296 amounting to Rs. 950, and Rs. 93 cesses from the year 1294 to the year 1296, in all Rs. 1,043, into the malcatchery of the said second party at Poddardihi in due time, but the rent was not received and dakhilas were refused. Therefore, I deposit the said rent in Court praying that it may be credited in the name of the second party, and that orders may be passed to serve a notice on him." On the 21st of September the Raja executed a vakalatnama, by which he appointed four pleaders by name, in order to file a petition and other papers and argue the case on his behalf in the rent suit, and authorized them to sign his name and file petitions, &c., and take vouchers for moneys in deposit. And on the 24th the following petition was filed in the rent suit:—"The representation of the second party in the above case is this: My tenant, the said first party, has deposited Rs. 1,043 rent due to me. The said first party has not deposited interest, &c., and I shall take steps for the same hereafter. A voucher for Rs. 1,043 in deposit may be given for the present." None of the pleaders was called to explain how the money came to be drawn out, or to prove that there had been a mistake in doing it. There is no evidence in the case upon this matter, but these documents.

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In considering their effect it must be observed that the putni was not void; it was only voidable; the Raja might elect to assent to it and treat it as valid. Its validity depended upon the circumstances in which it was made. The learned Judges of the High Court appear to have fallen into the error of treating the putni as if it absolutely came to an end at the death of the widow. At page 180 of the Record, after referring to six or seven cases in the Indian Courts, they say: "In all these cases it seems to have been held that the receipt of rent from a person after his lease has expired operates as a recognition of his right as a tenant and constitutes in him some kind of tenancy which would require a notice to determine." Also at page 183 they speak of the expiry of the lease upon the death of the life tenant. And they hold that a receipt of rent was at least a recognition of a tenancy from year to year, which required a notice to quit. The real question does not appear to have been considered by them or properly by the Subordinate Judge, who says that in the petition for the withdrawal of the rent deposit the status of the plaintiff as putnidar was not recognized, but takes no notice of the petition depositing the money. The taking rent which was in that petition stated to be due under the putni was *primâ facie* an admission that the putni was still subsisting, an election by the Raja to treat it as valid. If it could have been shown that the receipt of the rent ought not to have that effect, evidence bearing upon that point ought to have been adduced by the Raja. In the absence of such evidence their Lordships think, there is a sufficient *primâ facie* case of an election by the Raja to affirm the validity of the putni; and they will humbly advise Her Majesty to dismiss the appeal and to affirm the decree of the High Court, which, in their opinion, is right, although not for the reasons given by the Court. The appellant will pay the costs of this appeal.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Boddam.

Kamakshi Nayakan .. Appellant* (*Plaintiff*).

v.

Ramasami Nayakan and another ... Respondents (*Defendants*).

Kamakshi Nayakan *v.* Ramasami Nayakan.

Guardian and minor—Guardian and manager, alienation by—Alienation by guardian and manager how far binding on minor—Limitation Act XV of 1877, Sch. ii, Art. 44, 91—Deed, cancellation of—Suit for possession without setting aside deed—Suit by a minor to set aside acts of a guardian.

Alienations by a guardian, of his infant's estate are void and are not binding on the infant except in so far as they can be shown to have been made for his benefit, or made under circumstances otherwise rendering them binding on him.

A suit by a minor who has attained majority to recover possession of properties alienated by his guardian by a deed executed under circumstances not binding on him is not governed either by Art. 44 or Art. 91 of Sch. ii of the Limitation Act, as it is unnecessary for him to get the deed cancelled or set aside as a condition precedent to his recovering possession.

The plaintiff more than three years after attaining majority with full knowledge of the facts, brought a suit for a declaration that a certain hypothecation deed executed by his guardian during his minority was not binding on him.

Held: that the suit was barred.

Second appeal against the decree of the District Court of Madura in A. S. No. 1 of 1895 reversing the decree of the Court of the District Munsif of Dindigal in O. S. No. 407 of 1893.

The third defendant, a widow, is the mother of the plaintiff and during his minority executed a registered hypothecation bond of item I of the plaint properties to the first defendant in 1884. Subsequently she conveyed a portion of item II to the first defendant by a registered deed of sale in 1886 and then mortgaged the remainder of item II to him by a registered deed executed in 1888. The plaintiff more than three years after attaining majority instituted the present suit in 1893 against first defendant, the second defendant claiming interest under the first, and the third defendant, his mother, for a decree declaring that the hypothecation

* S. A. No. 929 of 1895. 5th November 1896.

Kamakshi Nayakan v. Ramasami Nayakan.

deed of 1884 is not binding on him and for recovery of possession of item II on the ground that the two instruments of 1886 and 1888 created no interest in the first defendant. The District Munsif found for the plaintiff and decreed the suit.

Defendants 1 and 2 then preferred an appeal to the District Court and the District Judge without going into the merits dismissed the suit on the ground of limitation. He said:

"The first question which must be decided is whether the suit was or was not barred by limitation, and the District Munsif, quoting the decision in *Unni* v. *Kunchi Amma*, I. L. R., 14 M., 26, holds that it was not barred, because the plaintiff was no party to the alienations, because the suit was to recover possession of immoveable property the prayer for a declaration that the deeds executed by the third defendant were not binding on him being merely ancillary, and because under these circumstances the period of limitation was 12 years. But in *Unni* v. *Kunchi Amma* the case for the plaintiff was that the person who made the alienations, the *karnavan* of a Malabar *tarwad* had no authority to make them and their Lordships expressly followed the rule of law laid down in *Raman* v. *Valia Amma* (S. A. 270 of 1880 not reported), that a plaintiff not being bound by a deed executed by another person without authority need not sue to set it aside, but may treat it as non-existent. But in this case the authority of the third defendant as the *defacto* guardian of the plaintiff to make the alienations, for lawful purposes, had not been challenged, immediate effect was given to the alienations, and they were not void *ab initio* but only voidable. One conclusion which the District Munsif has formed in para. 14 of his judgment on the 3rd issue (notwithstanding the remarks in para. 9) is that the plaintiff became the first defendant's tenant of a part of the property in dispute, and this conclusion must be accepted. It may, therefore, be doubted whether the plaintiff had not ratified the acts of his guardian and whether he is not estopped from bringing the present suit. However this may be, I think it is clear that since the three instruments executed by the third defendant were, as is practically admitted, executed with authority, and since immediate operation was given to them the prayer for a declaration was not merely subservient to the prayer for possession but was an essential pre-requisite. The *prima facie* title under these instruments is with the first defendant, and the plaintiff cannot recover possession until he has displaced that title. In *Janki* v. *Ajit* (I. L. R., 15 C., 58 at p. 65) the Privy Council held that when possession of immoveable property cannot be recovered until a deed of sale has been set aside, and

it is necessary to bring a suit to set aside the deed upon repayment of the consideration money paid by the defendant, the suit is not a suit for the possession of immoveable property in the sense to which the limitation of 12 years is applicable. The result of this and other decisions is summed up in the case of *Ghulam Rasul* v. *Ajab Gul* (Punj. Rec. No. 57 of 1891 quoted at p. 115 of Rivaz' Commentary on the Indian Limitation Act) where it was said that the principle applicable is that when a person sues for immoveable property and is met by a defendant in possession founded upon a title which, as between him and the defendant is null and void, the plaintiff may be at liberty to ignore the transaction and to get the benefit of 12 years' limitation; but if he is not at liberty to treat the title or the transaction in which it originated as a nullity, then one of the shorter periods of limitation is applicable, such as Arts. 44, 91, &c., according to the circumstances of the particular case." As I have found that the bonds in this suit are not null and void, I must hold that the suit is not one for the recovery of immoveable property in the sense that the period of limitation is 12 years, inasmuch as recovery is impossible without the cancellation of the bonds.

Then the plaintiff's prayer in respect of item No. 1 was for a bare declaration that the hypothecation deed of 8th January 1884 is not binding on him. In this particular, therefore, the suit clearly falls under Art. 91 of the second schedule of the Indian Limitation Act and, being brought more than three years after the plaintiff attained majority with a full knowledge of the facts is barred."

The plaintiff then preferred this second appeal to the High Court.

P. S. Sivaswami Aiyar for appellant.

M. E. Sriranga Chariar and *T. Natesa Aiyar* for respondents.

The Court delivered the following

JUDGMENT:—So far as the claim for a declaration that the hypothecation bond is not binding, the action is barred.

As regards the rest of the claim, the mortgage and sale relied upon executed by the plaintiff's mother and guardian are void as against him except in so far as they can be shown to be for his benefit or executed under circumstances otherwise rendering them binding upon him. Therefore in this suit for possession of the property comprised in such deeds, it is unnecessary for the plaintiff to

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set them aside as a condition precedent to a decree for possession. We think, therefore, that neither Art. 44 nor Art. 91 applies.

We must, therefore, modify the decree of the District Judge as to the possession of the land referred to in the mortgage and sale, and direct the appeal to be heard on the merits and disposed of according to law. The respondents must pay and receive the proportionate costs of this appeal.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Benson.

Raghavendra Rao and another ... ... { Appellants* (*Defendants*)

v.

Jayaram Rao ... ... { Respondent (*Plaintiff.*)

Raghavendra Rao v. Jayaram Rao.

Hindu Law—Adoption of wife's sister's daughter's son—Marriage of a wife's sister's daughter—*Viruddha Sambandha*—Texts of *Hindu Law*, mandatory and hortatory.

The adoption to a Hindu of his wife's sister's daughter's son is valid under Hindu Law.

Neither under Hindu law as laid down by the *Smritis* and expounded by the leading commentaries thereon, nor under any special or local usage, is the marriage by a Hindu of his wife's sister's daughter invalid.

The distinction between Hindu Law texts which are mandatory and those which are merely hortatory discussed and pointed out.

The text found in *Aswalayana's Grihya Parisishta* disapproving of marriages which are *Viruddhasambandha*, is only hortatory and not mandatory.

Minakshi v. *Ramanatha*, I. L. R., 11 M., 49, distinguished.

Under Hindu Law, adoption of a boy is to the adoptive father alone whether the adoption is made by himself during his life or by his widow after his death; consequently the relationship of the adoptive mother to the natural father of the adopted boy cannot affect the validity of the adoption.

Sriramulu v. *Ramayya*, I. L. R., 3 M., 15, followed.

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* A. No. 111 of 1896. 3rd March 1897.

Appeal against the decree of the District Court of North Arcot in O. S. No. 41 of 1893.

The facts of the case appear sufficiently for the purpose of this report from the judgment of the Court.

C. Sankara Nair and *K. Naraina Rao* for appellants.

V. Bhashyam Aiyangar, C. R. Pattabhirama Aiyar, R. Sadagopachariar and *T. Jivaji* for *V. C. Desikachariar* for respondent.

The Court delivered the following

JUDGMENT :—That the late Narasinga Rao's widow, Seshammal, did in fact adopt the respondent as the son of her husband was practically admitted on behalf of the appellants, the first of whom is Narasinga Rao's undivided nephew and the second that appellant's son—a minor. It was, however, contended on their behalf that Narasinga Rao did not authorize Seshammal to make the adoption and even if it is found that he did so authorize her the adoption is invalid in consequence of the relationship which existed between Narasinga Rao and the natural mother of the respondent.

[Then the learned Judges discussed the evidence as to the question whether authority was or was not given by the deceased and concurred in the finding of the lower Court that authority was given.]

Next as to the validity of the adoption, so far as we were able to follow the appellant's Vakil's arguments on the point, the chief contention was this :—

The respondent's natural mother, being Seshammal's sister's daughter, could not under the Hindu Law have been lawfully married to Narasinga Rao and, therefore, the respondent could not have been validly adopted as his son. It being the settled law of this Court, except where there is evidence of special usage to the contrary, that the natural mother of the boy to be adopted, should be a person, who, in her maiden state, might lawfully have been married to the man for whom the adoption is to be made, the question for determination is whether a Hindu is, by law, precluded, as the appellants contend, from marrying his wife's sister's

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daughter. In support of this contention we were not referred to any text either in the *Smrithis* or in the leading commentaries. The only text, to which our attention was drawn on behalf of the appellants, is to be found in *Aswalayana's Grihya Parisishta* which runs thus :—

" *Viruddha Sambandha* (relation which is *Viruddha* (contrary or improper) owing to the relationship (existing) between the bride and the bridegroom (before the marriage) being similar to that of a father or a mother, as for instance the daughter of a wife's sister (and) the sister of the paternal uncle's wife ". (Mandlik's Hindu Law, p. 484.) A glance at the numerous rules, laid down by the ancient Hindu legislators with reference to the selection of a bride, is enough to show that they are with very few exceptions, mere rules of caution and advice. Now does the passage, relied on by the appellant, belong to this class of hortatory texts or does it lay down a rule of law rendering a marriage contrary to it unlawful? That it belongs to the former class is evident from the fact that none of the well-known authoritative commentaries prohibit the marriage of a wife's sister's daughter, a fact which by itself is sufficient to render it the duty of the Courts to decline to accept the text in question as laying down an imperative rule. Nor is authority wanting to support this view. In *Kulluka Bhatta's* remarks on Manu III, 6 to 11, referring to the numerous minor objections to be avoided in selecting a bride, the commentator in terms points out that a violation of none of the rules contained in them affects the legality of the union. (*Gurudass Bannerjee's 'Marriage and Stridhanam,' p.* 68). But in his comments on verse 5 of the same chapter, which deals with the really forbidden marriages between *sagotras* and *sapindas,* he observes thus :—" In the matter of marriage, as it has been ordained in this text, he who inadvertently marries a girl sprung from the same original stock with himself (*sagotra*) and so forth, must support her as a mother," and as it has been said (by certain legislators) that if girls of the same *gotra* and so forth be taken in marriage they must be deserted and that penance must be performed if a marriage be contracted with a girl of the same *gotra,* consequently, together with those, the girls related as mother's *sapindas* do not also become wives." (*Vyavastha Chandrika,* Vol. II, p. 475.) These observations

clearly lead to the inference that marriages are to be held to be unlawful only in cases, as to which desertion of the girl and the observance of penance for atoning the offence committed in entering into the prohibited alliance are laid down by accepted authorities. But it is not pretended that any authority prescribes that if a man marries his wife's sister's daughter he must abandon her and perform penance. Further, nearly all the recent important text writers who have considered the matter are agreed that a marriage between a man and his wife's niece is valid.

Dr. *Gurudass Bannerjee* in his work on 'Marriage and Stridhanam' already cited, states that the law "does not prohibit marriage with the wife's sister or even with her niece or her aunt" (page 69); *Syama Charan Sirkar* in the note to *Vyavastha* 712 of the *Vyavastha Chandrika* wherein he states the substance of the authorities as to void marriages, excludes from that category unions such as those described by him in *Vyavastha* 698, inclusive of that between a man and his wife's sister's daughter, Vol II, pp. 475 and 463). Mr. Mandlik in his edition of *Vyavahara Mayukha* and *Yajnavalkya,* observes "as regards *Viruddha Sambandha* they are permitted as a matter of course." (Appendix p. 415). *Golap Chunder Sirkar* in his work on "The Hindu Law of Adoption" expresses himself thus: "But be it specially noticed that no marriage is invalid on the ground of relationship being incongruous. In addition to the two instances mentioned in *Ghrihya Parisishta* of *Aswalayana* there are other passages prohibiting on the selfsame ground the marriage by a man of his step-mother's sister, her brother's daughter and his children's daughter as well as the preceptor's daughter; but however improper such marriages may be they are nevertheless valid. Such marriages are generally contracted by high class Brahmins of Bengal who are compelled by the restrictions imposed by Kulinism to choose their wives from a certain limited number of families" (p. 319). Lastly, *Jogendra Nath Bhattacharya* expresses substantially the same views in his Commentaries on Hindu Law. He writes: "A text of *Boudhayana* and a passage from *Grihya Parisishta* are cited in the *Nirnaya Sindhu* which exclude the following :—

1. Step-mother's sister and sister's daughter.
2. Paternal uncle's wife's sister.

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3. Paternal uncle's wife's sister's daughter.

4. Wife's sister's daughter.

The texts which exclude these are neither cited nor commented upon by *Raghunandana.* In practice no hesitation is felt in this part of India in marrying paternal uncle's wife's sister. Marriage with step-mother's sister takes place some times in Bengal. Instances of marriages with wife's sister's daughter are also not altogether unknown in Bengal, though Hindu sentiments are very strong against these marriages (2nd edition, p. 95).

With reference to this concluding observation of Mr. *Bhattacharya* regarding the sentiments of the people as to the propriety of such marriages, it may perhaps be pointed out that there is little to indicate that these marriages are disapproved of by the members of any section of the community in this part of India. Be this however as it may, the unimpeachable evidence, adduced on behalf of the respondent, shows beyond the shadow of doubt that marriages between a man and his wife's sister's daughter are common among the various sections of the Brahmin community and are regarded by all as perfectly valid. It is necessary to refer to this evidence briefly. The specific instances of marriages spoken of by the witnesses took place in various parts of the Presidency widely separated from each other, *viz.*, the following 8 Districts :—Nellore, Madras, North Arcot, South Arcot, Tanjore, Trichinopoly, Coimbatore, and Madura. The Honourable Mr. N. Subba Rao, belonging to the Madhwa sect—a vakil of this Court—stated that his own mother's sister was married to a person who had previously married that lady's maternal aunt. The witness also stated that his paternal grandfather, after the first wife's death, married that wife's sister's daughter and that the marriages spoken to by him took place long ago. These cases probably belong to the Nellore District. Mr. V. C. Desikachariar, an Aiyangar and a practitioner of this Court, residing in Madras, stated that his mother-in-law, who is his father-in-law's second wife, is the daughter of her husband's first wife's sister. The witness added that the late Mr. V. Shadagopachariar, who was a very distinguished Vakil of this Court, had married the sister of his (Shadagopacharlu's) paternal uncle's wife and this took place long ago. Krishnasami Aiyar, a Smartha Brahmin of Chittoor, in North Arcot, deposed that his father married

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about twenty-five years ago as his second wife, the witness's aunt who was the sister of witness's mother. Ramachandraiyar, a Smartha Brahmin of Chidambaram in South Arcot, stated that his fourth and present wife is the daughter of his deceased third wife's sister and that the marriage took place in 1888. Ramakrishna Dikshatar, another Smartha Brahmin also from South Arcot, said that his second wife is his first wife's sister's daughter and that he was married 13 years ago. Mr. Govinda Rao, who is of the Madhwa sect and who is employed as *Cirkil* under the Collector of Tanjore, stated that he is married to his deceased wife's sister's daughter. P. Srinivasachariar, an Aiyangar, also belonging to the same district, stated that he had married the sister of Dewan Bahadur Srinivasa Raghava Aiyangar, the present Dewan of Baroda, and that when she died, he—the witness—married her sister's daughter. Mr. Srinivasa Rao, a Madhwa getleman now in Bangalore, gave evidence to the effect that on the death of his first wife, the late Raja Sir T. Madhava Rao's daughter, the witness married her sister's daughter. Dewan Bahadur Raghoonatha Rao stated that, in addition to two instances already referred to, *viz.*, those of Govinda Rao of Tanjore and Srinivasa Rao of Bangalore, who are both related to him, he knew many cases of a man marrying the niece of his wife. Ramachariar, who is a Madhwa too, spoke to having been present at 7 or 8 such marriages either in the Trichinopoly, Coimbatore or Madura District and added that, about 18 or 19 years ago, he himself married his deceased wife's sister's daughter. Krishna Rao, the District Munsif of Kulittalai, stated that a sister of his and a daughter of another of his sisters were successively married to the same man in Coimbatore. Nearly all the witnesses affirmed positively that no exception whatever was at any time taken to any of the marriages spoken to by them.

On the part of the appellants nothing has been really urged to rebut the irresistible inference arising from such widespread usage as that established by the evidence just noticed, in favour of the validity of the marriages which the test of Aswalayana condemns on the ground of incongruous relationship.

We have, therefore, no hesitation in holding that the said text is not mandatory and that the appellant's contention founded thereon is entirely unsustainable.

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We think we are not precluded from arriving at this conclusion by the reference made to the above text in *Minakshi* v. *Ramanatha*, I. L. R., 11 M., 49. It would seem on the strength of the statement in *Dattakamimamsa* that a marriage between the persons mentioned in the text in question was a prohibited connection, it was assumed by the Court that the text was mandatory. But whether the text was mandatory or merely hortatory was not a matter for determination in that suit, and therefore the Court's observations cannot be treated as a binding decision on the point.

The only other objection taken to the legality of the adoption rested on the fact that the adoptive mother Seshammal is the cousin of the natural father of the respondent. But this contention also is untenable; since it has been ruled in this Court that the adoption of a son of even a wife's brother is good. (*Sriramulu* v. *Ramayya*, I. L. R., 3 M., 15). It is scarcely necessary to say that it is immaterial in such a case whether the adoption is made by a man himself or by his widow after his death; for the adoption is for him. We must therefore confirm the decree of the District Judge and dismiss the appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur Collins, *Kt.*, Chief Justice, and Mr. Justice Benson.

Seshammal ... ... Petitioner * (*Plaintiff*),

v.

Munisami Mudali ... ... Respondent (*Defendant*).

Seshammal v. Munisami Mudali.

Presidency Small Cause Courts Act, §§ 37, 69—New trial, application for—Full Bench of the Presidency Small Cause Court—Power to state case to the High Court—Civil Procedure Code, § 622.

When an application is made to the Full Bench for a new trial of a suit under § 37 of the Presidency Small Cause Courts Act (XV of 1882), and such application is granted by the Court and the suit re-opened, the Full Bench disposing of such suit has power under § 69 of the Act to state a case to the High Court. . . . . *Oakshott* v. *The British India Steam Navigation Company*, I. L. R., 15 M., 179, distinguished.

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* C. R. P. No. 784 of 1895. 26th October 1896.

Petition under S. 622 of the Civil Procedure Code praying the High Court to revise the decree of the Full Bench of the Court of Small Causes, Madras, in Suit No. 19335 of 1892, reversing the decree of the Chief Judge of that Court. Seshammal v. Munisami Mudali.

T. P. Kothandarama Aiyar for petitioner.

C. R. Pattabhirama Aiyar for respondent.

The Court delivered the following.

JUDGMENT:—The plaintiff sued in the Presidency Small Cause Court, and her claim was decreed by the Chief Judge. Under S. 37 of the Act the defendant made an application for a new trial, and the Small Cause Court, consisting of the Chief Judge and two other Judges, heard the application, and in doing so went into the merits of the case. The Chief Judge differed from his colleagues on a point of law, and still maintained that the claim should be decreed, but his colleagues taking a different view on the point of law, the Court reversed the decree passed by the Chief Judge and gave judgment for defendant with costs.

Plaintiff now puts in this revision petition under S. 622, Civil Procedure Code, on the ground that, as the judges differed on a point of law, they were bound, under S. 69 of the Presidency Small Cause Courts Act, to refer the case for the opinion of the High Court, and either to reserve judgment or deliver judgment contingent upon such opinion.

We think the petition must be allowed. The provision of S. 69 is imperative; it says:—"If two or more judges sit together in any suit * * and differ in their opinion as to any question of law * * * the Small Cause Court shall draw up a statement of the facts of the case, and refer such statement * * * for the opinion of the High Court, and shall either reserve judgment or give judgment contingent upon such opinion."

It is contended for the counter-petitioner that the difference of opinion now in question did not arise in any suit, so as to come within the purview of S. 69, but only on an application under S. 37, and it is pointed out, that it has been held in *Oakshott* v. *The British India Steam Navigation Company*, I. L. R., 15 M., 179, *Nusserwanjee* v. *Pursutum Doss*, I. L. R., 11 C., 298, and *Hall* v. *Joakim*, 12 B. L. R.,

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34, that the Small Cause Court cannot state a case for the opinion of the High Court on an application for a new trial under S. 37 of the Act. The fallacy in this argument lies in not observing that in the present case the full Small Cause Court did more than consider the application for a new trial. No doubt, the cases quoted are an authority for holding that, while the Court is considering whether a new trial shall be granted or not, S. 69 has no application, but in our opinion, when the Court goes further and proceeds to deal with the merits of the case, it must be held that the new trial has been granted, and that the Court is thenceforward engaged in trying a fresh suit. In all the above-quoted cases the application was rejected, so that S. 69 could not in any way apply; but in the present case though no separate order formally granting a new trial was made, yet such new trial was by necessary implication, granted before the Court proceeded to re-hear the suit. The cases quoted are, therefore, no authority for the counter-petitioner's contention. Indeed, in every one of them it is assumed that if a new trial had been granted, the reference to the High Court could properly have been raised, and we have no doubt but that that assumption is correct.

We must, therefore, set aside the revised decree of the Small Cause Court with costs and direct that the suit be restored to its file and be dealt with in accordance with law as laid down in S. 69 of the Presidency Small Cause Courts Act. As the Chief Judge who was a party to the decree now set aside is absent on leave, but will shortly return, it is desirable that the case should not be taken up for reference until his return.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Benson.

Venkataramanayamma Garu. } Appellant in both, (*Plaintiff* in O. S. No. 8, and *Defendant* in O. S. No. 12 of 1893.)

v.

Appa Rao Bahadur Garu and another. } Respondents in No. 164.

Appa Rao Bahadur ... Respondent in No. 165.

Will, revocation of—Revocation of will—Conduct of testator and of persons claiming under will—Hindu Law—Inheritance—Nature of estate which daughter's sons take—Obstructed heritage, nature of holding in—Self-acquired property converted into co-parcenary property by joint treatment—Joint treatment of self-acquired property, what constitutes.

Venkatarama-nayamma Garu *v.* Appa Rao Bahadur Garu.

The revocation of a will may be proved, not only by declarations of intent of the testator to that effect, but also by (1) evidence of the conduct of the testator with reference to the will and with reference to transactions concurrent with the will and so connected with it as to form part of the same transaction with it; and (2) evidence of the conduct of persons taking under the will and who know or must be presumed to have known of the existence of the will, acting as if there were no will.

Under the Hindu law the estate which daughter's sons take in property which they inherit from their maternal grandfather does not carry with it any right of survivorship. The daughter's sons hold such property only as tenants in common and not as members of an ordinary co-parcenary governed by the Mitakshara law.

In order that such property may be claimed by right of survivorship, there must be an arrangement by mutual consent, express or implied, between persons so inheriting, altering radically the character of their title to the estate by substituting a joint tenancy in place of a tenancy in common. If such consent is to be implied from circumstances, they should be unequivocal and should point unmistakably to an intention to effect a mutual transfer.

N and A, two Hindu brothers, inherited property from their maternal grandfather in 1884. A was then a minor; he attained majority in 1889. In 1892, N died, and A then claimed the whole property to the exclusion of N's widow. A proved that he and N were living together and treating the property they inherited from the maternal grandfather as members of a joint undivided Hindu family, and in support of it, he proved the following circumstances:—(1) Joint messing and residence; (2) investment of surplus income of the estate in a joint trade, or in purchasing property in their joint names; (3) unequal consumption of funds without any separate accounts,

* A. Nos. 164 and 165 of 1895. 25th February 1897.

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but only one joint account for the whole family; (4) borrowing in joint names and payment by one, or borrowing in one of the brother's names and payment by the other.

Held: that N and A originally took as tenants in common; that the circumstances relied on by A were not enough to convert the property into co-parcenary property and that N's widow was the heir to his share of the property and, that A had no manner of right to it.

Appeals against the decrees of the District Court of Godaveri in O. S. Nos. 8 and 12 of 1893.

The facts of the case appear sufficiently from the judgment of the Court.

APPEAL No. 164 OF 1895.

V. Bhashyam Aiyangar, C. R. Pattabhirama Aiyar, E. Venkatarama Sarma, V. C. Seshachariar, K. N. Aiya and *P. Subrahmania Aiyar* for appellant.

H. G. Wedderburn for respondents.

C. Ramachandra Rao Saheb, N. Subba Rao, P. R. Sundara Aiyar, and *D. Seshagiri Rao* for 1st respondent.

R. Kuppusami Aiyar for 2nd respondent.

MEMORANDUM OF OBJECTIONS.

C. Ramachandra Rao Saheb for 1st respondent.

V. Bhashyam Aiyangar, C. R. Pattabhirama Aiyar, E. Venkatarama Sarma, V. C. Seshachariar and *P. Subrahmania Aiyar* for appellant.

APPEAL No. 165 OF 1895.

The Advocate-General (J. H. Spring Branson), E. Venkatarama Sarma and *K. N. Aiya* for appellant.

H. G. Wedderburn, C. Ramachandra Rao Saheb, N. Subba Rao, P. R. Sundara Aiyar and *D. Seshagiri Rao* for respondent.

JUDGMENT:—The permanently-settled estates of Jaggampeta, Dontalooru and Rayavaram, the most important of the properties in litigation, belonged originally to Venkata Rao who died in July 1869. He left surviving him his widow Venkayamma, his daughter Chelikani Venkataramanayamma, and the latter's eldest son, Niladri. Venkayamma claiming to be the heir took

possession of the whole of his estate, movable and immovable, and held the same till her demise in July 1875. Then Venkataramanayamma succeeded to the property and died in July 1884 leaving behind her, her husband Sami Rao, Niladri already referred to, and her second son, Appa Rao, as well as three daughters; the last four having been born subsequent to the death of Venkata Rao. At the time of their mother's death Appa Rao was aged 13 years and Niladri was aged 19 years. He was, therefore, no longer a minor. He was, however, still treated as a minor, and Sami Rao, who had been managing the property ever since the death of Venkata Rao, continued to do so on behalf of both his sons. How long his management lasted does not clearly appear. The evidence, however, shows that sometime before 1889, Niladri had assumed management, and had been carrying it on account of himself as well as Appa Rao. But from 1889 when Appa Rao attained majority, both the brothers jointly looked after the property and continued to do so until September 1892 when Niladri died without male issue, leaving a widow Venkataramanayamma and two daughters. The widow alleges that Niladri on his death-bed executed a will (Exhibit K), but this is now denied by Appa Rao. Sami Rao died on 28th November 1892. Until the death of Sami Rao, the widow and Appa Rao were on amicable terms, and the former's claim to a moiety of the whole property was admitted by the latter and both remained in joint possession of the estate. But in consequence of disputes having arisen she was ousted from possession of the property soon after Sami Rao's death. Thereupon the two suits from which these appeals are brought were instituted.

In one of these O. S. 12 of 1893 (A. S. 165 of 1895) Appa Rao sued to set aside the alleged will (Exhibit K) of his brother Niladri, and in the other, O. S. 8 of 1893 (A. S. 164 of 1895), the widow sued for possession of the whole of Niladri's property. The District Judge decided against the widow in both suits, and against both decrees she now appeals, Appa Rao being the first respondent. In O. S. 8 of 1893 the appellant (Venkataramanayamma) based her case upon the will of Venkata Rao (Exhibit A), dated the 6th September 1866, which was, soon after its execution, deposited under a sealed cover in the District Registrar's Office and which has ever since remained there, and upon Exhibit K the alleged will of

Niladri, dated the 2nd September 1892. In her plaint she also prayed in the alternative that if her claim to the whole estate should be held to be unsustainable, such share as she might be found entitled to should be decreed to her.

The principal defence of the first respondent as to Exhibit A was that it was revoked, as to Exhibit K that it was not genuine or valid. It will be convenient to defer the discussion of matters connected with Exhibit K until A. S. 165 (O. S. 12 of 1892) is taken up for consideration.

The first question, therefore, for determination is whether Exhibit A was revoked. The Hindu Wills' Act does not apply to the case, and no special mode of revocation being prescribed, revocation like any other question of fact may be proved by apt evidence, though no doubt mere oral evidence in a matter like this should be received with great caution. What amounts to revocation in common law was clearly pointed out in *Doe dem Reed* v. *Harris* cited for the first respondent. There Lord Denman, C. J., in the course of his judgment, observed: "Some doubt has been entertained whether any declaration could be sufficient without the word "revoke"; but upon full consideration we think it impossible so to limit the testator's power of revocation—and that any equivalent word or words and expressions would be sufficient for that purpose. But further, we are now required to consider, whether, without any language at all, a testator may revoke a will by the conduct he exhibits. And this appears to be tantamount to an enquiry whether conduct *can* give a positive declaration of intent. If it can, there can be no more *necessity* for words than for the use of a particular expression. Now, nothing is easier than to imagine such gestures and proceedings connected with the will, as must fully convince every rational mind that the testator intended to revoke his will and thought he had done so by the means he took for that purpose. But if he who has power to revoke by declaring a present resolution then to do so, does in fact make that resolution manifest, it seems clear that the act of revocation is complete in every essential part." (8 Ad. and Ell. at page 11.)

Such being the rule on the point, does the evidence here establish the 1st respondent's contention that though Exhibit A has

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long remained in the Registrar's Office, yet it was in reality revoked? The evidence in support of it consists chiefly of the testimony of the 7th and the 8th witness called for the 1st respondent and certain circumstances connected with the enjoyment and devolution of the bulk of the property referred to in the will. Exhibit XXXIII, copy of the vakalat spoken to by the said 7th witness, the reception of which in evidence was rightly objected to on behalf of the appellant both in the lower Court and here on the ground that the original was not accounted for as required by law, must be excluded from consideration.

Now as to the evidence of the two witnesses relied on, Gaurayya, the 7th witness, is a pleader whom Venkata Rao had employed to transact his legal business from March 1866, that is for some six months previouly. The material portion of his evidence may be given in his own words: "I heard that Venkata Rao executed a will. He spoke to me about a will. He told me he had cancelled the will and the pattas, and he said that he would empower me to get back the will from the Registrar's Office. He said that he had taken back the pattas. He said that he would give me a valakat registered. I did not get back the will from the Registrar's Office as I fell ill. The vakalat was executed at Jaggampeta, and I took it to Peddapur. Nilachalam asked me to return the vakalat as he heard that I was not well. He said that they would send somebody else. Nilachalam was the son of the kept woman of the Rajah and was looking after the estate under Venkata Rao. He was a confidential servant of Venkata Rao. I returned the vakalat to him. Nilachalam is dead." Virayya, the 8th witness and maternal uncle of Nilachalam, referred to by the 7th witness, stated that he was a servant under Venkata Rao and that he (the witness) was present when Nilachalam informed Venkata Rao that he had brought the will, that thereupon Venkata Rao said "tear it," and that Nilachalam tore the paper which he led Venkata Rao to believe was the will. Turning now to the weight due to the testimony of these witnesses, Guarayya appears to be unconnected with either of the parties in the litigation. He is apparently independent, and his cross-examination suggests no grounds for impugning his evidence, which is confirmed strongly by the fact that a vakalat to get back the will from the Registrar's Office was executed by Venkata Rao on the 21st November 1867, presented for registration on the 24th idem, and subsequently duly

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registered (Exhibits 40 and 40*a*.) The conversation, which the witness says took place between him and Venkata Rao, is therefore likely to have taken place. But the 8th witness's story is in itself so extraordinary that it cannot be depended upon in the absence of corroboration and this is altogether wanting. Two matters are, indeed, relied on as corroboration. The first is that some of the papers connected with the cancellation of grants of land referred to in the will, one to Venkata Rao's sister and another to his illegitimate sons made about the time of the execution of the will had been fraudulently abstracted from the records of the Collector sometime before 1871 (Exhibit XXXIX). The other is the fact that Venkayamma in that year complained (Exhibit XXXVIII) that such clandestine removal of the papers had taken place at the instigation of Nilachalam and Venkata Row's sister. We do not, however, think that these matters can be accepted as affording any material corroboration of the story. That story, if true, implies that Nilachalam perpetrated a gross fraud on his father with whom he was on confidential terms. What motive Nilachalam had for so deceiving Venkata Rao is not shown. The suggestion is that he acted in the way alleged in the hope of being able to rely on the will after the death of Venkata Rao in support of some claim he (Nilachalam) intended to make to the property, the grant whereof was recited in the will, but the right to which he had relinquished as was evidenced by the missing papers. The suggestion is a mere surmise, and is too far-fetched to be safely acted upon. On the other hand, it is argued on behalf of the appellant that it was to the interest of Nilachalam that the will should have been destroyed; since in that event it might have been open to him as an illegitimate son to claim by inheritance a share of Venkata Rao's estate along with the widow or with the daughter or with the latter's son. The argument has little force since it has not been shown that the connection between Nilachalam's mother and Venkata Rao had been of such character as to give Nilachalam the status of an illegitimate son entitled to inherit under the Hindu Law. Nor has it been shown that Nilachalam thought he had a right to set up such a claim. The evidence of the 8th witness being in our opinion incredible and uncorroborated must be rejected and the fact that Exhibit A was not taken back from the Registrar's Office and destroyed must be treated as unexplained.

The fact, however, is not conclusive against the alleged revocation, and we must now see how far the evidence connected with the enjoyment and devolution of the property proves the revocation. In the will reference is made to grants of property already made to certain relations and dependents of Venkata Rao; the rest of his estate being left to his wife, Venkayamma, and after her to his daughter Venkataramanayamma and to his grandson Niladri. Of the grants *inter vivos* the most important are those made respectively to the testator's sister, to his illegitimate sons including Nilachalam, and to the testator's daughter, Venkataramanayamma. The sister got a village with a nett rental of about Rs. 4,000, the sons, another with a rental of about Rs. 2,000, and the daughter two villages with a rental of about Rs. 6,000 per annum (Exhibits XXXV, XXXIV and XXXVI). It appears from the statements in the will and in Venkata Rao's grant (Exhibit 35) to his sister that what really prompted him to make the grants and to execute the will was his serious illness in 1866. However, by October 1867, Venkata Rao had fully recovered and he then changed his mind about the grants and persuaded the grantees to relinquish their rights under the grants (Exhibits XXXIVa, and XXXVIII). This was in October 1867. The very next month Venkata Rao employed Gaurayya to withdraw the will, executed a vakalat to him for the purpose and even took the precaution of registering the vakalat. Considering that the three grants and the will came into existence almost simultaneously, viz., between the 6th and 14th September, and that the cancellation of the former was shortly afterwards followed by steps to take back the will from the Registrar's Office, the inference, it is argued, is that Venkata Rao wished to get the will back because it also had been cancelled. Now, though the facts on which the above argument rests are true, yet the inference drawn therefrom is far from being conclusive. Nevertheless, it would seem to be entitled to some weight when taken with the light thrown upon the matter by the conduct of Venkayamma, Venkataramanayamma and Niladri and by the views which they took of the titles under which they held the zemindari during the 23 years, which elapsed between the the death of Venkata Rao and that of Niladri.

What then were the views taken by them? Three days after her husband's death Venkayamma wrote to the Collector of

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Godavari a letter which runs thus:—"My husband Sri Raja Rao Venkata Rao Bahadur Garu having been unwell, owing to the illness he had, died on the 22nd of this month. I have a daughter called Chelikani Venkataramanayamma, a grandson by daughter called Chelkani Venkata Surya Niladri Rao of the age of four years and a granddaughter (by daughter) called Venkayamma aged one year. I am the heir to the whole of my husband's property according to law. I shall from this day forward manage the affairs. I, therefore, request you will be good enough to cause Jaggampeta, Dontalooru, and Rayavaram mittas which are standing in my husband's name to be entered in my name and grant me a Dhimat (a written authority for collecting revenue * * * ." Under the orders of the Board of Revenue, the estates were registered in the name of Venkayamma who was described in column 9 of the Register, Exhibit IV, bearing the heading "mode of transfer by sale, gift or otherwise" as having taken "by inheritance." After having held the property for about six years, Venkayamma became ill and wrote to the Sub-Collector of Godavari on the 14th July 1875 "I am not therefore confident that I would live and consequently write to you in regard to the whole of my property. I have got a daughter by name Sri Raja Chelkani Venkataramanayamma. The said Venkataramanayamma is the chief heir to my zemindari consisting of Jaggampeta, Dontaluru, and Rayavaram estates and to all other movable and immovable properties. I, therefore, request that the right to the zemindari consisting of the said estates may be registered in her name * * * ." On the 17th idem Venkataramanayamma herself communicated to the same officer her mother's death and after observing "I am the reversionary heir to all the estates, forming the movable and immovable property of my mother" concluded with a prayer for the registry being transferred to her name as *heir* (Exhibit V). Lastly, on the 27th June 1884, Venkataramanayamma wrote to the Collector of the District informing him that she had fallen ill, that she did not expect to recover from that illness, and that she had given to her two daughters some property and observed "after my death my two sons are the chief *heirs* to my estates and to the whole of my movable and immovable property." Exhibit I. This view was endorsed, in equally distinct terms, by Niladri himself in his letter to the Collector, dated the 8th July 1884, intimating his mother's death and asking

the estates to be registered in the names of *himself and the 1st respondent* which was accordingly done. Not only was no reliance placed on the will on these three important occasions but it is not shown that it was relied on or even referred to on any other occasion until, at all events, a month before Niladri's death in 1892. Such conduct on the part of the three successive holders of the estate tells strongly against the case of the appellant, who has consequently attempted to explain it away by suggesting that Venkayamma, Venkataramanayamma and Niladri were all ignorant of the will and of its provisions. This suggestion is hardly consistent with the plaint which, while it asserts that Niladri was unaware of the arrangement made by Venkata Rao, refrains from saying that such ignorance was shared by Venkayamma and Venkataramanayamma, nor is there any evidence whatever on behalf of the appellant to prove the alleged ignorance. The probabilities are all the other way. " It is difficult to see why Venkata Rao should have wished to keep the will a secret from his wife and his daughter who were living on affectionate terms with him at the time he made the will in their favour. On the contrary, if, as was said in one part of the argument on behalf of the appellant, one of Vekata Rao's objects in making the will was to prevent his illegitimate sons laying any claim by inheritance to a share of the zemindaries along with his widow, his daughter and his grandson by the daughter, surely he would have taken care to let these latter know what he had done to secure their rights against the possible claims of the illegitimate sons. Again, there was no secrecy whatever attending the execution of the will. It was written by Jagga Raja, one of Venkata Rao's gumastahs, and was attested by the Karnam and the Village Munsif of the place. Moreover about twelve months after the will was deposited in the Registrar's Office, the vakalat for its withdrawal was publicly executed and registered, Vakil Gaurayya having, as stated by him, paid a visit to the Zemindar in connection with that vakalat, and the then Sub-Magistrate in his capacity as a Registration Officer having attended at the Zemindar's residence to accept the presentation of the vakalat for registration. (Exhibit 40*a*.) That, notwithstanding all these circumstances, Venkayamma, Venkataramanayamma as well as the latter's husband Sami Rao who was residing with them all the time as a

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member of the family, somehow did not come to hear of the will in Venkata Rao's life-time is hard to believe. It is harder still to suppose that even after Venkata Rao's death, no information reached his successors at any time before August 1892, and the more so as Jagga Raja, the writer of the will, was alive all the time. Then it is also suggested that the ladies probably thought the will amounted to nothing more than a mere statement of the rights they possessed under the Hindu Law and so did not think it worth while or necessary to refer to, and rely upon, the will. This conjecture also, for it is nothing more, is a very unlikely one, for even if the ladies had supposed that the will amounted to nothing more than a declaration of their rights under the Hindu Law, they would still almost certainly have alluded to it at all events as confirmatory evidence of their claim under the Hindu Law. Another suggestion is that Venkataramanayamma did not wish Niladri alone to take the property to the exclusion of the 1st respondent, and the omission to refer to the will was due to this cause. This ingenious argument, however, cannot account for Venkayamma's conduct in 1869, as the 1st respondent was not born till two or three years later. It is scarcely necessary to add that so far as Niladri was concerned, his admission that he and the 1st respondent were *co-heirs* cannot be explained except upon the hypothesis that he was absolutely unaware of the provision of the will in his own favour. But in support of such hypothesis nothing is to be found in the evidence, whereas it is clear, upon the testimony of plaintiff's own 4th witness, Jaldanki Venkayya, that Niladri was aware of the will and of its provisions. In these circumstances the conclusion that the will was never after November 1867 treated as a subsisting testamentary paper seems irresistable. And how strong was the conviction in the minds of the members of the family that the instrument was not a subsisting one may be gathered from the suggestive ambiguity to which the persons, who drew up the plaint in this case, found it necessary to have recourse in alleging Niladri's exclusive right to the property. For, though several authenticated copies of the will had been obtained from the Registrar's Office by the appellant's agent a month or two before the plaint was filed, yet Exhibit A is not referred to in the plaint, nor is it even alleged that "the arrangements" under which Niladri got the estate were made anywhere in the will of Venkata Rao. When this is so contrasted with the explicit state-

ment in the plaint as to Exhibit K referred to therein by date and as the "will" of Niladri, it is pretty plain that the appellant's advisers were then unwilling to tie her down to the case that the arrangement, which was set up as having constituted Niladri the sole heir, was the one made under the will in question. This remarkable unwillingness on their part even at that late hour, considering that there was no doubt either as to the genuineness or the validity of the instrument, can be attributed only to the grave distrust felt by those advisers as to the possibility of treating Exhibit A as a disposition still in force.

Such are the chief considerations which favour the 1st respondent's contention. Against it, no doubt there is the fact that the document was not actually taken back from the Registrar's Office. Why Venkata Rao failed to get it back (as we have seen he intended to do) has not been explained, but this fact ought not to be pressed too strongly against the 1st respondent, since owing to the lapse of time almost all the persons who would have been in a position to throw light on the matter were dead at the time of trial. In these circumstances Gaurayya's evidence, coupled with the course of conduct referred to above is entitled to great weight and the finding of the District Judge that the will was revoked must be held to be correct. On this finding it is unnecessary to go into the questions which would arise if the will were still in force.

Now Venkata Rao having died intesate it follows, that on Venkataramanayamma's death, that inheritance passed to Niladri and to the 1st respondent as his daughter's sons, and the question then arises whether at the time they succeeded to the estate, they took the property with the right of survivorship under the law, or separately without any such right.

Having regard to the well-known Mitakshara doctrine of right by birth, giving rise to that form of joint property designated as "unobstructed heritage" as opposed to "obstructed heritage," it is difficult to see how the present question can be answered except in the negative. According to that doctrine only the man's son, son's son and son's son's son acquire a right by birth and thereby a community of interest in the property of the father, grandfather or great grandfather. Such community of interest, however, does not entitle any of the coparceners to predicate before a partition

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is effected, what the extent of his share in the joint property is, since the share is liable to diminution by the successive births of other co-owners. But that very circumstance renders it just and right that when any member of such a coparcenary dies, his undefined interest should not vest in his own heirs but should lapse to his survivors and go to augment their rights in the undivided family estate. Hence the rule of survivorship recognized under the Mitakshara system. When however, under the same law, property passes by pure inheritance or obstructed heritage, it vests only in him who is the heir in existence at the time the inheritance opens. (*Narasimma* v. *Virabadra,* I. L. R. 17 M. at p. 292), and if there happen to be two or more co-heirs the share of each is not liable to variation by the subsequent birth of a person of the same class but is fixed and definite. Consequently in such a case the reason for the rule of survivorship does not exist and the rule itself is totally inapplicable. This conclusion drawn from principle is well supported by authority also. In *Gopalasami* v. *Chinnasami* (I. L. R., 7 M., 458) *Turner,* C. J., and *Brandt,* J., expressed a strong inclination against the applicability of the doctrine of survivorship to a case like the present. And in *Jasoda Koer* v. *Sheo Pershad Singh* (I. L. R., 17 C., 33) *Petharam,* C. J., and *Bannerjee,* J., after a critical examination of the chief passages, relating to the question, in the Mitakshara and other works, and after referring to the leading decisions that throw light on the subject, held that the principle of survivorship under the Mitakshara law is limited (1) to property which is taken as unobstructed heritage (including property thereby acquired) and (2) to the joint property of reunited coparceners, but does not extend to property which is inherited by two brothers as heirs of their mother's father and which does not fall under either of those descriptions. This considered decision was referred to with approval in the analagous case of *Saminadha Pillai* v. *Thangathanni* (I. L. R., 19 M. 72) where *Shephard* and *Best,* J. J., held that when a group of heirs took the estate of a deceased divided member after his mother, the rule of survivorship did not apply. The *ratio decidendi* of this decision and of the Calcutta ruling which in effect it followed, is identical, viz., that survivorship does not exist in any case in which property passes as *obstructed heritage.* The heritage in the present case being that of daughter's sons is

an obstructed heritage, and is therefore on the above principle not subject to the incident of survivorship.

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On the part of the 1st respondent, however, certain passages of the Saraswathi Vilasa, particularly paragraphs 632, 646 and 654 (Foulke's translation, pp. 125-129), were relied on. The doctrine propounded in those passages is stated, in the very commencement of the disquisition to be the teaching of *Lakshmidhara*. *Dr. Jolly* considers that as it is not clear whether the author of the Saraswathi Vilasa meant to make the teaching his own, it does not possess more than a historical interest, (Hindu Law, p. 202). The doctrine, in question, in the words of the same learned writer, is that "property devolving on a daughter who has a son assumes the nature of unobstructed property and is passed on by the daughter's son to his own son in case he was alive at the time of the devolution of the estate." (*Ib.*) According to this view, a daughter's son in existence at his mother's succession, takes a *vested* right the moment the property devolves on his mother. But it is well settled that the right of such an heir to inherit his grand-father's estate is *contingent on his surviving his mother and her sister, if any*. Moreover, the assertion that, in the case supposed, the inheritance assumes the nature of unobstructed heritage does not appear to be supported by any of the other treatises of the Mitakshara school, since none of them recognize any exception to the fundamental theory that from the widow downwards the property devolves as obstructed heritage. This is necessarily implied in most of those treatises. In one of them at least, viz., the Vyavahara Mayukha, the author begins the discussion regarding the descent of a sonless separated man's property with words which have been translated, "order of succession to obstructed heritage" (Mandalik, p. 76), words which, in the absence of subsequent qualification, must be taken to include in terms under "obstructed heritage." Even the case spoken of by Lakshmidhara's teaching cannot, as pointed out by Mr. Mayne, be now accepted as law. (Hindu Law, 5th edition, note to Sec. 519.) *Muttayan Chetti* v. *Sivagiri Zamindar* (I. L. R., 3 M., 370) and *Sivaganga Zemindar* v. *Lakshmana* (I. L. R., 9 M., 188), were also referred to on behalf of the 1st respondent. But they clearly do not touch the present question. There, it was held that as between a man

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and his son the former's power of disposition over property, inherited by him from his maternal grandfather, is restricted as it is the case of unobstructed property belonging to the man and his son. Whether this conclusion can be maintained after the decision of the Judicial Committee in *Saratj Kuari* v. *Deoraj* (I. L. R., 10 A., 272) is open to doubt. Now the *ratio decidendi* in the concise words of *Shephard* and *Davies,* J., J. in the recent Pittapur case, is this:—" Where the right to a partition is wanting there is no restraint on the power of alienation." (See also *Sivasubrahmanya Nayakar* v. *Krishnammal,* I. L. R., 18 M. at p. 301). Such being the rule laid down by the Privy Council and it being unquestionable as it is admitted by the learned Judges who decided the case in I. L. R., 7 M., that a partition of property inherited from a maternal grandfather cannot be claimed by a son of the man who thus inherited it, it would seem to follow that the view, taken in those two cases to the effect that though a son cannot ask for a share of such property he can nevertheless impeach his father's alienation thereof is no longer sustainable. But supposing it to be otherwise, those cases are quite distinguishable from this. In them the question related to a man's power to restrain alienation of immoveable property coming to his father as obstructed heritage. And in support of the view adopted there, Mitakshara, Chapter I, S. 27, may perhaps still be relied upon as an authoritative text, upon the exact weight due to which no direct pronouncement has yet been made by their Lordships of the Judicial Committee. In the present case, however, the question is not between a father and his son seeking to restrain his father's alienation, but between the representative of a sonless deceased co-owner and the surviving co-owner claiming by survivorship the share of that deceased co-owner, in property in which the co-owners took *no right by birth,* and, therefore, neither the survivor nor the representative of the deceased ought to be affected by any of the peculiar consequences following from such right.

The finding upon this question of law must therefore be against the first respondent. The next question to be considered is whether though the brothers took originally as tenants in common, the 1st respondent is entitled to Niladari's moiety by survivorship in consequence of the mode in which the property was

dealt with by them between 1884 and 1892. It was urged on behalf of the 1st respondent that, in cases like the present unless the contrary is shown, it should, as a matter of law, be taken that the rule of survivorship prevails. We do not find any ground for this contention. No doubt, when two persons capable of forming a joint family under the Mitakshara hold some property in common and the requisite legal foundation has been laid for the conclusion that that property is undivided family property then the presumption of law in respect of all other property in the hands of any of the members of the family is that the same is joint and if a member of such a coparcenary alleges that any particular property is in fact not part of the joint estate but his own separate property, he has to rebut the presumption and prove his allegation. But if that is done and if an interest in the particular property is claimed by some other member on the ground that though originally separate it subsequently became joint property, the *onus* of establishing the claim is undoubtedly on the member who advanced it.

Now, here inasmuch as according to the finding already arrived at, Venkata Rao's estate with its accretions devolved on Niladri and the 1st respondent as mere tenants in common, it is for the 1st respondent to show that, subsequent to such devolution, Niladri's share ceased to be his property, and that the shares of the two were merged into a common whole with the incident of survivorship attaching to it. In other words, the 1st respondent has to make out that he and Niladri had, by mutual consent, express or implied, altered radically the character of their title to the estate by substituting for the several ownership of each in his respective moiety (with absolute power to alienate and with right to transmit by inheritance to his own heir), a joint ownership, with a restricted power of transfer and a right on the part of the survivor to take the whole in the event of the other dying sonless. Does the evidence prove that any arrangement of the kind took place? If the 1st respondent were able to satisfy the Court that, as alleged in his written statement, he and Niladri held other property which was joint and that they incorporated therewith the property now in dispute, the contention under consideration must succeed. But he has clearly failed to show any such incorporation. It is

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conceded that Niladri and the 1st respondent derived no property at all from any ancestor in their paternal line save Sami Rao, their father. It is conceded also that when Sami Rao left his father's house many years ago and went to reside with Venkata Rao, Sami Rao possessed no ancestral or other funds, and it is admitted that his subsequent acquisitions consisted only of certain jewels (said to be worth Rs. 10,000 or 15,000) which were presented to him by his father-in-law, his mother-in-law, and his wife. But it is stated by the 1st respondent himself and two other witnesses, on his behalf, one his servant and the other his relation, that a couple of months after Venkataramanayamma's death Sami Rao, having himself fallen ill, handed over to Niladri the key of the box, containing the former's jewels with the object of transferring the ownership in them to both the sons. This entirely uncorroborated story that a man, who had then two sons and a daughter living, the sons being in affluent circumstances whilst the daughter was not well provided for—took it into his head to give away to his sons alone the whole comparatively little property he had, in order that that little might form a common stock with which the extensive separate property in question was to become incorporated, is one which on the face of it bears evident marks of invention for the purposes of this litigation and is, therefore, altogether unworthy of serious consideration. Moreover even if Sami Rao had really parted with the jewels, as alleged, how would that advance the 1st respondent's case? For nothing was done by the brothers with reference to the jewels, and it is difficult to understand how the mere fact of joint possession thereof by them lends the slightest support to the theory of incorporation. Nor does the 1st respondent's contention stand on a better footing with reference to the other circumstances relied on in proof of the alleged incorporation, *viz.*, (1) Joint residence and messing together; (2) Investment of the annual surplus income in trade for the benefit of both the brothers or in property acquired in their joint names; and (3) Niladri's expenses being in excess of those of the 1st respondent. In drawing inferences from circumstances like the above it must be borne in mind that facts not distinctly inconsistent with the presumption of the continuance of the original tenancy in common

cannot afford any support to the 1st respondent's contention (compare *Robinson* v. *Preston*, 27 L. J. Ch., 395.)

To support it, the circumstances relied on should be unequivocal, and should point unmistakably to an intention to effect a mutual transfer of the kind suggested. But those referred to above do not point to any such conclusion. The only fair inference to be drawn from them, taking them all together, is that the brothers did not feel any necessity for dividing either the corpus or the income and found it convenient for the time being to live together and manage their property in common. To hold that, because the brothers merely refrained from dividing what in law was separate, their conduct amounted to nothing more, therefore they intended to effect a complete change in their relative rights would be unreasonable and unwarranted. Let us now look at each circumstance separately. So far as residence and food go, matters continued exactly as they had been prior to 1884, when the brothers owned no property derived from their father or mother. As to joint investment the interest possessed by the brothers in the business carried with the aid of their surplus income as well as in property acquired thereby is *prima facie* of the same character as that possessed by them in the incomes so invested (see *Robinson* v. *Preston*, *supra*) and there is absolutely nothing to show that in the present case their interest was otherwise. No doubt the brothers did occasionally borrow money on their joint promissory note. But surely tenants in common may do so for the purposes of their common estate. Why then should it be assumed that such acts were done by the brothers as members of a joint Hindu family, the very point to be proved, and not as tenants in common as they were shown to have been at starting ? Again the arguments founded on inequality in the expenses of the brothers is entitled to little or no weight, since it entirely disregards the ordinary latitude likely to be allowed between brothers out of natural affection and good feeling) a consideration which ought not to be lost sight of in dealing with an argument like that in question. *Lala Muddan Gopal Lal* v. *Khikhender Koer* (L. R. 18 I. A. at p. 21). Lastly, as to the documents referred to in the argument with reference to this part of the case, it is to be observed that they really only bear upon one or other of the circumstances just dealt

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with, and, therefore, require no further notice. For these reasons, differing from the District Judge we must hold that the second ground, taken for the 1st respondent's contention in regard to survivorship also fails, and consequently, Niladri's moiety passed to the appellant as his widow and heir.

There remains a minor point in appeal No. 164 raised by the appellant, viz., that certain Inam lands included in the plaint property but found by the District Judge to belong to 2nd respondent were really purchased with money which belonged to Niladri and the 18th respondent and were, therefore, properly included in the present suit.

The 2nd respondent admits in his evidence that he did receive from the brothers in November 1891 when he was in their employ as a clerk, Rs. 4,000, which sum was entered in their accounts as sent to him for the purchase of Inam lands. He also admits that he bought at a court sale held in that very month the lands in dispute for less than Rs. 2,000. He moreover concedes that he has not repaid any portion of the Rs. 4,000 sent to him as recited in the accounts. Nor is it his case that the sum was a gift or a loan to him. In these circumstances his interested evidence that the lands were acquired with his own funds cannot be depended upon and there is no other to prove the plea. The property must, therefore, be held to have been acquired by him with the money and for the benefit of his then employers, Niladri and the 1st respondent.

We must now determine whether the alleged will of Niladri, Exhibit K, is genuine or not. This is the only question in appeal No. 165. The District Judge was of opinion that it is not, and with that conclusion we concur. On the part of the 1st respondent some evidence was given to shew that several hours before the time when Exhibit K is said to have been executed, Niladri had become quite unconcious. But the witnesses were few, and mostly interested and it does not appear to be safe to act upon their evidence. The question depends, therefore, upon the intrinsic evidence of the will itself, the probabilities of the case, and the credit to be attached to the testimony adduced on behalf of the appellant. The substance of that testimony is this. At about 3 P.M. on the 2nd

September 1892, Niladri was taken ill of cholera. The attack was a sharp one. After the appearance of the disease the patient was confined to bed where he suffered from the evacuation and vomiting which accompany the disease. He gradually became worse and a considerable time before the alleged execution of the will the following symptoms had appeared. The whole of his body was cold and covered with clammy perspiration. He was suffering from thirst and spasms and cramps not only in the legs but in the hands also. His eyes were sunken and his voice had become feeble. There was suppression of urine also. At about 10 P.M. he expressed a wish to leave a will. Jaldanki Venkayya, the 4th witness, who was close by listened to what he said. Niladri's instructions were that his daughters should each get immoveable property yielding Rs. 2,000 per annum, that the appellant should adopt a son and that the appellant and the son to be adopted should take half the estate. Venkanna Pantulu, the appellant's 11th witness, a Second Grade Pleader, who happened also to be present, thereupon dictated to Subbarayudu, the appellant's 14th witness, Exhibit K. This took about half an hour. The paper was then read out to Niladri who approved of it, took it in his hands, put it on his pillow and signed it, and out of the crowd of 30 or 40 people present at the time the nine persons whose signatures appear in the document attested it then and there and the document was immediately sent to the appellant who was in her own apartment. About 12 P.M., Niladri's condition became hopeless. His voice became indistinct, the spasms ceased and at 2 A.M. of the 3rd the Hospital Assistant thought the man was dying, though he did not actually expire till twelve hours later.

Now all the attesting witnesses as well as one, Balakrishna Murti, said to be the family doctor, and Venkata Doss, appellant's brother, speak to the execution and the 1st respondent himself some time after Niladri's death treated the will as genuine. We are not however prepared to accept the evidence of the appellant's witnesses as true. The District Judge says of the attesting witnesses generally that their evidence left an unfavourable impression on his mind. Jaldanki Venkayya and Venkanna Pantulu, the second Grade Pleader, are the two most important witnesses, but their credibility is impeached by the appellant herself who called them,

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the insinuation being that though they were compelled to adhere to the account which they had given before the Sub-Registrar as to the execution, they were nevertheless hostile to the appellant, and had been won over by the 1st respondent. A similar insinuation was made against Sarabayya, another attesting witness and a Karnam of the village. No great reliance can, therefore, be placed on the evidence of these witnesses. The remaining witnesses, excepting perhaps the Hospital Assistant, are men of no position. The whole of the oral evidence of the appellant's witnesses in support of the will is rendered suspicious by their consistent determination to deny the existence of any draft of the will. A draft however (Exhibit 25) was found. It is proved that it is in the hand of the writer of Exhibit K, and indeed, in this Court, it is admitted that it is in fact a draft. Now in this draft the land left for the support of the three daughters is said to produce an annual sum of Rs. 4,500 being at the rate of Rs. 1,500 for each daughter, whereas in the will itself the figure is Rs. 6,000 being at the rate Rs. 2,000 for each daughter, and the oral evidence is that Niladri never mentioned Rs. 1,500 at all but desired that the provision for each daughter should be Rs, 2,000. Jaladanki Venkayya, who said he listened to the alleged instructions of Niladri, Venkanna Pantulu who got these instructions reduced to writing, and Subbarayudu who wrote Exhibit XXV and Exhibit K, all failed to furnish any satisfactory explanation for the discrepancy. The two former pretended that they did not remember anything about a draft, and Subbarayadu, who as the writer of Exhibit XXV could hardly make the same plea falsely stated that Exhibit XXV was not a draft at all but a copy subsequently prepared. These attempts to keep back the truth about a material matter show that the oral evidence is not trustworthy, but the chief difficulty in supposing that the account given by the witnesses is true arises from Niladri's physical condition at the time when he is said to have signed Exhibit K. Now, between the first appearance of the disease at about 3. P. M, and the time (10 P. M.) when the will is said to have been executed, more than seven hours had elapsed. From the first the patient was steadily sinking and long before the time of the alleged execution, "Niladri had became so enfeebled" as to be literally unable to move from his bed even for necessary purposes. Further, an hour before he is said to have given expression to his wishes about the will, when

the Hospital Assistant arrived, most if not all of the symptoms spoken to by Surgeon-Major Marsden, the expert witness, distinct indications of a total failure of vital powers were observed in Niladri.

The Hospital Assistant's evidence shows that he was suffering from cramps and twitching not only of the legs, but also of the hands, and the latter were cold and clammy. It is impossible to believe that a man in this condition writing prostrate in bed and with the paper placed on a pillow made what purports to be Niladri's signature in Exhibit K. The signature is a long, firm, bold and flowing signature. It bears a tolerable resemblance to Niladri's ordinary signature, but on close examination reveals some characteristic differences, the most prominent of which is noticed by the District Judge. It is also to be observed that though the will is attested, as the District Judge says "with a superabundance of caution by no less than nine witnesses" none of his relations signed it. His father, his brother, his wife's brother, and his sister's husband were either in the house or not far away at the time, yet not one of them has attested it, and the explanations offered for this omission are not, in our opinion, satisfactory.

We therefore, agree with the District Judge in holding that the document is not genuine.

Such being our conclusion, it is perhaps unnecessary to speculate as to how and why the will was concocted; but the subject requires some notice in order to understand how it was that the 1st respondent came to act upon this spurious document for some time as if it were a true one.

Here we are left without any direct evidences, but the circumstances of the family and the probabilities of the case lead us to the conclusion that in all probability the will was concocted by Sami Rao, with the assistance of Venkanna Pantulu, the 2nd Grade Pleader, with a view to prevent litigation in the family and to secure the devolution of the property in the way that had apparently been contemplated by the family for many years, and the will was accepted by 1st respondent in the belief that it was genuine, until after Sami Rao's death, on the 28th November, the real facts began to be spoken of and came to the knowledge of the 1st respondent

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who speedily filed his suit on the 13th Dec. 1892. The evidence shows that shortly before his death Niladri procured a copy of the will of 1866 and consulted the 2nd Grade Pleader, Venkanna Pantulu, as to the rights under it, and the latter expressed an opinion that it gave the whole property to Niladri. Sami Rao must have known that their attempt to act upon the will of 1866 would have led to litigation since Appa Rao would not be likely to easily give up the position he had long enjoyed with respect to the family property. Sami Rao would also have been anxious to secure the long admitted rights of Appa Rao. When, Niladri was suddenly attacked with cholera and was likely to die, the time was favourable for attempting to secure Appa Rao's position and to prevent future litigation by concocting a will in the terms of Exhibit K. Venkanna Pantulu and Jalandi Venkaya the sheristadar of the estate would be the natural persons from whom to seek assistance. If their co-operation were secured the signatures of any number of persons could easily be procured on a representation that the will was prepared at the request of, and was signed by, the testator even though the witnesses had not really seen him sign the will. This would be done the more easily when it was known that the will was such as Niladri might probably have left. Once the witnesses had signed their names they would be afraid to admit that they had not really seen Niladri sign, and would thus become witnesses to the genuineness of the will. These suggestions are supported by the fact that there was no attempt to make a will until Venkanna Pantulu arrived, late at night, from his village, some four or five miles away and by the fact that none of the relations signed the will. Even Sami Rao refrained from doing so, in order that less attention might be drawn to him, and that he might not be suspected of any concern in getting it up. The admitted circumstance that Exhibit K was written at Venkanna Pantulu's dictation goes far to shew that he was its true author.

Venkanna Pantulu's statement is that he heard casually about 8 P. M. that Niladri was ill with cholera and went over to enquire for him. It is hardly likely that he would have gone so considerable

a distance so late at night merely for this purpose, but his presence and protracted stay at the house is explained if we understand that Sami Rao urgently required his advice and assistance.

It was possible to get up the will without much fear of either the appellant or the 1st respondent at once coming to learn the truth; for they were both absent from the place where Niladri was lying ill—the appellant being confined to her apartment in the zenana and the 1st respondent having been kept away on the ground that it was dangerous for him to visit a man suffering from cholera.

Sami Rao's subsequent conduct is also consistent with the conclusion that the will was his handiwork. For, his presence when the 1st respondent and the appellant on the 5th September made statements before the Tahsildar referring to Exhibit K and asking that effect should be given to it, as well as his accompanying the 1st respondent when a few days later the latter called on the Collector in connection with the registry of the appellant and himself, showed that Sami Rao was active in getting the appellant and the 1st respondent to proceed as if the spurious document were genuine so that they might both be committed to it as soon as possible. Had Sami Rao lived, it is possible his influence might have insured that the origin of the will should have been kept a secret. As it was, his death was speedily followed by the 1st respondent denouncing the will and filing his suit to set it aside.

To sum up then.—We find that the will of 1866 was revoked, that there was no right of survivorship between Niladri and Appa Rao, that on Niladri's death, the appellant as his widow succeeded to his property and that the will of 1862 is not genuine. The result of these findings is that in appeal suit 164 there will be a decree for partition and delivery to the appellant of a moiety of the disputed properties including the inam lands in the hands of the 2nd respondent with proportionate mesne profits from 1st December 1892 until delivery of possession or three years from

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date of decree, the amount thereof to be ascertained in execution, provided, however that the following items in Schedule C, I, shall be excluded *i.e.*, Nos. 17, 22, 23, 38, 75, 77, 81 and 87; and provided also that Nos. 37, 51, 97, 98, 103 and 121 in the schedule to the Commissioner's Report be included. Item No. 7 in Plaint schedule A I should be described as "a box" only and item No. 78 in the same schedule should be described as containing only two pearls.

In appeal suit No. 165 there will be a declaration that Exhibit K is not genuine. In other respects both the suits must be dismissed; the parties will pay and receive proportionate costs in each case in the lower Court as well as in this Court. The decrees of the Court below will be modified accordingly.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Arthur Collins, *Kt.*, Chief Justice, Mr. Justice Shephard, Mr. Justice Subrahmania Aiyar and Mr. Justice Benson.

Arumugam and others ... Accused in Calendar Case No. 29 of 1896, on the file of the Head Assistant Magistrate of Coimbatore.*

v.

Karuppayi ... ... Complainant.

Criminal Procedure Code, Ss. 157, 168, 173—Charge sheet—Police occurrence reports, right of the accused to get copies of—Public documents—Indian Evidence Act, Ss. 74, 78. Arumugam v. Karuppayi.

(*Per. Chief Justice, Shephard, J., and Benson, J.:—Subrahmania Aiyar, J. dissentiente*).

An accused person has no right before the commencement of his trial either to inspect or to obtain copies of (1) the occurrence report made under S. 157 of the Criminal Procedure Code, and (2) the report made under S. 168 of the Criminal Procedure Code by a subordinate police officer to the officer in charge of a police station. These reports are not public documents not being "acts or records of acts" of public officers within the meaning of S. 74 of the Indian Evidence Act.

Per. Chief Justice and Benson, J.—

An accused person has no right before the commencement of his trial either to inspect or to obtain copies of the charge sheet drawn up under S. 173, Criminal Procedure Code. The charge sheet is not a public document within the meaning of S. 74 of the Indian Evidence Act.

[*Per. Shephard and Subrahmania Aiyar*, J. J.] :—

An accused person has a right before the commencement of his trial to inspect and obtain copies of the charge sheet drawn up under S. 173 of the Criminal Procedure Code. Such a charge sheet is a public document within the meaning of S. 74 of the Indian Evidence Act.

Per. Shephard, J.:—The word 'acts' in S. 74 of the Indian Evidence Act means final and completed acts as distinguished from acts of a preparatory or tentative character like the inquiries which a public officer may make under the Criminal Procedure Code or otherwise, and which may or may not result in action.

(*Per Subrahmania Aiyar*, J.—An accused person is entitled before the commencement of his trial to inspect and to obtain copies of not only the charge

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* Cr. Rev. C. 328 of 1896. 30th April 1897.
Case referred No. 136 of 1896.

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sheet framed under S. 173, Criminal Procedure Code, but also of the two reports referred to in Ss. 157 and 168, Criminal Procedure Code.

Case referred for the orders of the High Court, under Section 438, Criminal Procedure Code, by the Acting Sessions Judge of Coimbatore in his letter, dated 20th July 1896, No. 996.

This case coming on for hearing on the 17th September, 1896, before a Division Bench (consisting of *Mr. Justice Subrahmania Aiyar* and *Mr. Justice Davies.*)

The Court made the following;

Order of Reference to the Full Bench.

The question raised in this case is whether the accused was, at the time he applied for copies of certain police reports including a charge sheet submitted to the Magistrate before whom he stood charged, entitled to obtain the copies for defending himself in respect of the offence of which he was accused.

Now there can be no doubt that the papers in question are public documents within the meaning of S. 74 of the Indian Evidence Act, since they are records of the acts of public officers submitted by them as required by law (Ss. 157, 168 and 173, Code of Criminal Procedure), or in the discharge of their official duty, and it is equally undoubted that under S. 76 of the Evidence Act, the accused would be entitled to the copies, if the documents are such as the accused has a right to inspect.

Though there appear to be no express legislative provisions with reference to the question under consideration, yet it is perfectly clear that, in the eye of the law, every person has a right to inspect public documents, subject to certain exceptions, provided he shows he is individually interested in them (Taylor on Evidence, IXth Edition, S. 1492, Vol. II, p. 992). In *Mutter* v. *The Eastern Midlands Railway Company,* Lindley, L. J., with the concurrence of the Lords Justices Cotton and Bowen, laid down the rule thus :—

"When the right to inspect and take a copy is expressly conferred by a statute, the limit of the right depends on the true construction of the statute. When the right to inspect and take a copy is not expressly conferred the extent of such right depends on the interest which the applicant has in what he wants to copy and on what is reasonably

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necessary for the protection of such interest. The Common Law right to inspect and take copies of public documents is limited by this principle as is shown by the judgment in *Rex* v. *Justices of Staffordshire,*" (38 Ch. Div. 92 at p. 106).

In the case mentioned by the Lord Justice, Lord Denman, Chief Justice, observed that for the persons interested "Every officer appointed by law to keep records ought to deem himself for that purpose," (for the production of documents), "a trustee". 16 Adol. and Ellis 84 at p. 100.

Such being the law on the point, and the applicant being unquestionably interested in documents like the present as the person accused of the charge to the investigation of which they relate, it must be held that he is entitled to inspect them, and therefore, to copies thereof under the section of the Evidence Act referred to above. In support of this view, it may also be pointed out that as it cannot be desired that the accused might at his trial summon the police officer as a witness and call for and use the reports in question with reference to the examination of such a witness, it stands to reason that he should be permitted to ascertain their contents in order that he may act, with an accurate knowledge of all available information which may prove useful in defending himself. (See *Fox* v. *Jones, Barnewall & Cresswell,* 732 at p. 734). The above conclusion, arrived at on general principles, appears to receive some confirmation from the provisions of S. 172, Criminal Procedure Code, which exempts "police diaries" from being called for or seen on behalf of the accused, thus implying that reports, like those in question or other proceedings of the police, may be inspected at the instance of a person possessing the requisite interest.

We should here observe that, apart from general principles, if in any case an order had been made upon police occurrence reports or charge sheet affecting the person accused, such as an order for his arrest or for his remand to custody, he is *ipso facto* entitled to a copy of that document under the express terms of S. 548 of the Criminal Procedure Code.

In our view, no weight should be given to the suggestion of the Public Prosecutor that to allow the accused access to documents like the present would enable them to tamper with prosecution witnesses and thus hinder the course of justice. On the

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contrary, it is impossible not to feel the force of the observations of *Trevelyan J.* that he did not know of anything more disastrous to the administration of Criminal Law, than that the accused should be debarred from having access to information to which he has a right and to which he is not absolutely debarred from having access by some express provision of the legislature (*Sheru Sha* v. *The Queen Empress*, I. L. R., 20 C., 642 at p. 645).

It was not argued that at all events the accused ought not to be furnished with the copies until the time of the trial. But it is difficult to see how in the absence of any distinct authority so restricting the exercise of the right in question, it can be contended that the accused can be refused inspection and copy until the state of trial is reached. If the right exists at all, the party entitled thereto, must be held to be at liberty to claim it at any time he considers fit to do so since obviously he is the best judge of when the right is to be exercised. Certainly it is but natural that accused persons should desire to have and apply for copies of papers, in which they are interested, even before the trial commences and the judgment of Lord Ellenbrough, C. J., in *King* v. *Tower* (4 M. and S., 163) shows that applications like the present, are not premature and ought to be complied with.

The recent case at I. L. R., 19 M., 14 of *Empress* v. *Venkataratnam,* relied on by the Public Prosecutor, while seeming to recognize the right of the accused to obtain copies, would however seem to deny the exercise of such right even at the beginning of a trial. This is not in accordance with the view taken by us. We must, therefore, refer to the decision of a Full Bench the question whether the accused had, from the moment of his accusation, a right to inspect and obtain copies of the documents in question for the purpose of his defence.

The Acting Public Prosecutor (*N. Subrahmaniam*) on behalf of the Crown.

V. Krishnaswami Aiyar and *P. R. Sundara Aiyar* for the accused.

The Full Bench delivered the following

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The Chief Justice:—In answering this reference to the Full Bench, I intend to follow the exact words of the reference. The question is whether the accused had, from the *moment of his accusation,* a right to inspect and obtain copies of the documents in question for the purpose of his defence. These documents are certain police reports including a charge sheet. The reference assumes that the documents are records of the acts of public officers submitted by them as required by law—see Ss. 157, 168 and 173, Code of Criminal Procedure—and that they are public documents within the meaning of S. 74 of the Indian Evidence Act, and that any person interested in the subject matter of a public document has a right to inspect it and under S. 76, Evidence Act, has also the right to have a copy of such document supplied to him; but that is really the point the Full Bench has to decide. There appears no doubt that a person accused is a person interested in the documents referred to in Ss. 157, 168 and 173 of the Code of Criminal Procedure, if the reports relate to the accusation against him; and if such reports are public documents he would be entitled to inspect and have copies of such documents. I would remark that the accused person would thus be in a position to know before any evidence is given against him all the information the police have collected relating to the offence and their reasons for suspecting the accused. The accused would, if he had the above information, have every opportunity of making a successful defence even if he was guilty;—in fact he has a copy of the brief for the prosecution.

The question to be decided is, are these reports, made under S. 157—the occurrence report—and 168—the report made by a subordinate police officer to the station house officer, public documents, and further—the charge sheet drawn up under S. 173 a public document?

The definition of a public document is (so far as it relates to the question before me) "a document forming the acts or record of the acts of a public officer". It must be conceded that a policeman is a public officer.

S. 157 enacts that if, from information received or otherwise, an officer in charge of a police station has reason to suspect the

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commission of an offence which he is empowered to investigate, he shall forthwith *send a report of the same* to a Magistrate empowered to take cognizance of such offence upon a police report and shall proceed in person, or shall depute one of his subordinate officers to proceed to the spot and investigate the facts.* * *

Now, can it be said that this report is a document forming the acts or records of the act of a public officer? I am of opinion that it is not. It is the reasons the officer in charge of the police station has for suspecting the commission of an offence.

S. 168 directs that a subordinate police officer who has made any investigation, shall report the result of such investigation, to the officer in charge of the police station. I am of opinion that reporting the result of an investigation cannot be said to be the act or record of an act of a public officer. S. 173 directs that, after the investigation under this chapter shall be completed, the officer in charge of the police station shall forward to a Magistrate * * * a report in a prescribed form setting forth the names of parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case and shall also state whether the accused person is in custody or released on his bond with or without sureties. This information—usually called the charge-sheet stands in a somewhat different position from the reports under Ss. 157 and 168, and it is possible to argue that the latter portion does relate to the act or record of the act of a public officer—*viz.*, keeping the accused in custody or releasing him on bail, but as that information would not be of the slightest use to the accused and as in my opinion the other information does not contain either an act or record of an act by a public officer, I hold that it is not a public document as defined by S. 74 of the Evidence Act.

The acts and record of the acts of the public officer while the investigation against the accused is carried on are contained in the police diary, but by S. 172, Criminal Procedure Code, the accused is not entitled to call for such diary. I give no opinion whether the accused can call for the reports and charge sheet during the progress of the trial, but I answer in the negative the question referred to the Full Bench.

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I may add, that I have not considered the English Criminal Procedure in relation to this case. The powers and duties of Magistrates and Police are so different in India to the powers and duties of the same officials in England that I consider any reference to English Criminal Procedure unnecessary.

Shephard, J.—Neither in the Criminal Procedure Code, nor in the Evidence Act, is there any provision declaring or limiting the right of private persons interested in criminal proceedings to inspect documents in the hands of third parties. A right to inspect public documents is, however, assumed in S. 76 of the Evidence Act; and having regard to the authorities cited in the order of reference, I think it may be inferred that the Legislature intended to recognize the right generally for all persons who can show that they have an interest for the protection of which it is necessary that liberty to inspect public documents should be given. Within that limit the right appears to be recognized according to the English authorities. In the present case there can be no question as to the interest of the party who claims inspection. It is plain that a person charged with an offence is legitimately interested in knowing before hand the particulars of the charge made against him and the names of the witnesses who are going to support it. His interest is none the less a legitimate one, because some persons might make improper use of the information so obtained. If, therefore, the documonts sought to be inspected are public documents, and if they are unprotected by special privilege, it follows that the claim to inspection must be allowed. If any of the documents is not a public document, the claim must clearly be disallowed. Documents of three sorts are mentioned in the order of reference. There is the report which the officer in charge of a police station is bound under the provisions of S. 157 of the Code to send to the Magistrate. There is the report which a subordinate officer is under S. 168 bound to send to the officer in charge of the station and there is the final report which under S. 173 the officer in charge of the station has, on completing his investigation, to send to the Magistrate. S. 74 of the Evidence Act, defines public documents; and if any of these reports is a public document, it must be because it forms the act or the record of the act of a public officer. Now, taking the first of them, commonly called the occurrence report, and applying the language of the Evidence Act, I

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cannot see how it can possibly be called a public document. In obeying the provisions of S. 157 of the Criminal Procedure Code, the public officer, as far as regards the Magistrate, does no act except the act of writing and despatching a report founded on information received by him. It is clear that this report does not form an act of the Station House Officer, within the meaning of the section, and it cannot be the record of an act because there has been no act on his part to record. In popular language any report which a subordinate officer is bound to send in to his superior officer and which is not confidential may be called a public document; but the Evidence Act lends no support to this view.

It is necessary to examine the language of the 74th section more closely in considering the report which the subordinate police officer is, under S. 168 of the Code, directed to send to the Station House Officer. It is a report of the result of the investigation under the provisions of Chap. XIV of the Code. No doubt there may, in this instance, be said to be a record of acts done by a public officer. Nevertheless, I do not think the report is a public document within the meaning of S. 74. In construing that section I think it may fairly be supposed that the word "acts" in the phrase "documents forming the acts or records of the acts" is used in one and the same sense. The act of which the record made is a public document must be similar in kind to the act which takes shape and form in a public documents. The kind of acts which S. 74 has in view is indicated by S. 73 of the same Act. The acts there mentioned are all final completed acts as distinguished from acts of a preparatory or tentative character. The inquiries which a public officer may make, whether under the Criminal Procedure Code, or otherwise, may or may not result in action. There may be no publicity about them. There is a substantial distinction between such measures and the specified act in which they may result. It is to the latter only, in my opinion, that S. 74 was intended to refer. Unless this line of distinction is drawn, I do not see where the right of discovery is to stop. If the report which a subordinate police officer sends to the station house officer, may be inspected before the trial, what is there to prevent inspection of the report which any other officer furnishes for the information of the Public Prosecutor? It is true that the police officer acts in performance of a statutory duty, but S. 74 makes no distinction between

such acts and other official acts. If an investigation amounts to an act of a public officer within the meaning of that section, and the report of it is, in consequence a public document, it practically follows that the accused is at liberty to look into the brief of the counsel for the prosecution. Arumugam v. Karuppayi.

The charge sheet which is prepared under S. 173 of the Code, stands on a different footing. When the charge sheet is sent to the Magistrate, the preliminary stage of investigation and preparation is over. Upon the receipt of it, the Magistrate may under S. 191 take cognizance of any offence that has been charged. The transmission of the charge sheet with a view to that result, accompanied by a statement as to the accused person whether he is forwarded in custody or not, may therefore, properly be called an act of a public officer and the charge sheet itself may properly be said to form a record of that act. It is only reasonable that an accused person should, when once the Magistrate is seized of the case, have access to the report stating the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case. On the other hand, there are good and obvious reasons why, in the case of communications prior to that stage between police officers themselves, or between such officers and the Magistracy—communications which may or may not result in a charge and may relate to third parties and extraneous matters, discovery should not be allowed.

The conclusion at which I arrive is that an accused person is entitled to inspect and, therefore to have a copy of the charge sheet before the trial, but that he is not entitled to inspect the other documents. Whether he is entitled to call for them at the trial is a different question with which we are not now concerned. It was on that question that the cases in *Sheru Sha* v. *The Queen Empress*, I. L. R., 20 C., 642 and *Bikao Khan* v. *The Queen Empress, Ib*, 16 C., 612 turned.

Subrahmania Aiyar, J. :—The further consideration which I have bestowed upon the question referred for decision, has not led me to think that the view expressed in the order of reference is erroneous. But some arguments, not urged before Davies J. and myself prior to the date of the reference, have been advanced since and the most important of them call for some notice.

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One of the arguments is that a right, similar to that put forward now on behalf of the accused, does not exist in England. But this ignores an essential difference which exists between the circumstances of the police in England and of the police in this country. There the law does not sanction an investigation by the police as is allowed by the Code of Criminal Procedure here. This is pointed out by Sir FitzJames Stephen in the history of Criminal Law where he observes:—"The second way in which proceedings may begin is by a police investigation. This process (Ss. 154, 172, Criminal Procedure Code), is unknown in England. It is not altogether unlike French Procedure, but it is still more like what would exist in England if the course usually taken in fact by the police were to be taken under a legal sanction, the police being invested by law with special powers to take evidence for their own information and guidance." (Vol. 3, p. 332). Owing to this difference between the two systems, official documents corresponding to "charge sheets" and "occurrence reports" under our Code are unknown to the law in England and, consequently, no question as to inspection of such documents has or could have arisen there.

The next argument appears to be that, as in England a person accused of an offence falling under the description "felony" is not entitled to a copy even of the indictment, it ought not to be held that an accused person in this country is entitled to copies of such documents as the charge sheet, etc. With reference to this argument, the first observation to be made is that the sole point for our determination being whether the documents in question are public documents within the meaning of S. 74 of the Evidence Act, one is unable to see any connection between that question and the fact that in England persons accused of a particular class of offence are disentitled to a copy of the indictment. In the next place, supposing the doctrine of English law as to copies of indictment in cases of felony is somehow germane to the present discussion, it is clear that even in England that doctrine is much disapproved of, if it has not already ceased to be law. (*Vide* Greave's Note O, III. Russel on Crimes, p. 463, 6th Ed.) But granting that it is well recognized in English Criminal Procedure, can it be defended as a just and sound rule whilst admittedly a man accused of a misdemeanour is under the same law treated better? The characteristics of reasonableness and of good sense, which alone would

justify our adopting a rule of English Common Law, being wanting in the particular instance relied on, a reference to it would seem scarcely calculated to throw true light on the question at issue. Arumugam v. Karuppayi.

Another argument was urged with reference to the law as to grant of copies of depositions in England. In arguing thus by analogy, the peculiar nature of the theory which prevailed in England (before salutary changes were introduced by 6 and 7, Will. IV, chap. II), as to a prisoner's position with reference to everything done in connection with the charge against him *prior to the trial* must not be lost sight of. That theory was that, in enquiring into and committing a person charged with an offence, a Magistrate was acting *inquisitorially*, that is, enquiries should be conducted in private and behind the back of the prisoner if that is considered necessary and that the prosecutor or solicitor alone might have access to the depositions taken by the Magistrate, but not the party accused, who, strangely enough it was thought, should not, before the actual trial, be enabled to know what the evidence to be adduced against him was (*Vide* the procedure adopted by the Magistrate in Thurttell's case and the observations of Justice J. A. Park in the same, I Step H. Criminal Law 227, 228). Referring to the working of a practice of this extraordinary description, Sir Fitz James Stephen justly observes "I do not think any part of the old procedure operated more harshly upon prisoners than the summary and secret way in which justices of the peace acting frequently the part of detective officers took their examination and committed them for trial". (*Ib.* p. 225). No doubt all this is now happily changed. But that such was the law and procedure even in the early part of this century ought to make one hesitate to look for light to the English practice under the Common Law in a matter like this. If we turn to the English Statute Law on the point, it cannot be denied that, so far as it goes, it affords reasonable facilities to the accused. The substance of it is this : a person under trial is entitled, subject to payment of certain fees, to copies of depositions, provided he applies for the same *before the day appointed for the commencement of the Assize or Sessions* at which he is to be tried. If, however, he is not diligent in the matter and applies later, he can get them only if the Judge considers that the copies may be made and delivered without delay and inconvenience to such trial. Nor are persons under trial who have not taken the precaution of

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securing copies of depositions thereby precluded from ascertaining before their trial the nature of the evidence recorded against them by the Magistrate, for they possess the right of *inspecting without fee or reward* all depositions or copies thereof which have been taken against them and returned into the Court before they are tried. (3 Russel on Crimes and Misdemeanours, 6th Ed., pp. 404 to 466 and especially Note V. at p. 466). What is there in these provisions to suggest anything against the granting of copies of the papers in question? Turning now to the provisions of the Criminal Procedure Code relating to those papers, it is necessary in order to understand their real import and nature to see why such provisions came to be enacted. Prior to the passing of the first Criminal Procedure Code, *i.e.*, that of 1861, the powers of the police were different from those now exercised by them. Complaints in cases of the more serious offences were usually laid before them. They were authorized to examine the complainant, to issue process of arrest, to summon witnesses, to examine the accused and to forward the case to the Magistrate or submit a report of the proceeding according as the evidence in their judgment warrant the one or the other course. These large powers were grievously abused for purposes of extortion and oppression and it was a question for the determination of Her Majesty's Commissioners appointed to consider the reform of the judicial establishments, procedure and laws 1856, whether the powers should not be greatly abridged. The Commissioners, however, came to the conclusion that considering the extensive jurisdiction of magistrates in this country, the facilities which exist for the escape of parties concerned in serious crimes and the necessity for the immediate adoption in many cases of the most prompt and energetic measures, it was requisite to arm the Police with some such powers as they then possessed (See p. 181 of the selections from the records of Government Papers relating to the reform of the Police in India, 1861). The original draft of the Criminal Procedure Code, therefore, sought to give effect to the above conclusion. But when the matter came before the Legislative Council much difference of opinion prevailed among the members of the Council in respect of some of the provisions inserted to carry out the view of Her Majesty's Commissioners. On the one side, it was contended that to allow the police to record statements of parties and witnesses and to place them before the Magistrate would be productive of much mischief.

On the other side, it was urged that in the interest, not only of the prosecution but also of the defence, it was necessary that such statements should be immediately recorded and laid before the Magistrate at once. (See Proceedings of the Legislative Council, Vol. V., pp. 515 to 545 and 570 to 574). The substance of the existing provisions of the law respecting the submission of reports by the police seems to have been devised to avoid the evils apprehended by one set of members and to secure in a measure some of the advantages to which the other members attached so much importance.

Now, first, the general report directed to be sent is the daily report called the diary. This, the law prescribes, should be forwarded to the officers of the Department itself in accordance with the principle insisted upon at the reorganization of the Police which took place about the same time as the passing of the Criminal Procedure Code, *viz.*, that dual control should be avoided and policemen should be directly dependent on and be responsible only to their own officers (p. 250 of the Selections already cited). And this diary, which must contain everything material heard or done by a policeman in the course of the day with reference to his work, was for obvious reasons declared not to be subject to inspection by the parties. Next special reports bearing upon particular cases coming up for investigation were directed to be submitted to the Magistrate. One of the objects, which the Legislature had in view in requiring the submission of these reports to the Magistrates, was manifestly to provide a record with reference to which the action of police officers engaged in making an investigation may be scrutinized during the later stages of the case. Now, who is more interested in exercising this scrutiny than the accused implicated in the particular case to which the investigation relates? It is impossible to believe that the Legislature intended that the persons so deeply interested in bringing to light any misconduct in connection with the investigation, should not have access to the records in question. If such were really the intention, why whilst expressly laying down that the general report or diary cannot be called for by the parties, the Legislature, singularly enough, refrained from declaring that these special reports also are confidential? Why did it not in terms extend the protection accorded to the diaries, to the other reports prescribed? It is scarcely necessary to add that to withhold from the accused access to the reports in question

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would certainly be to deprive those persons of one reliable means of ascertaining the development of the case during the investigation and to disable them from exposing, at the preliminary enquiry or trial, the attempts, if any, made by the police or other persons connected with the case, to get up false evidence, or other circumstances appearing in the reports and revealing flaws in the case for the prosecution.

As to S. 125 of the Evidence Act, that only provides against a police officer being *compelled as a witness* to say whence he got any information as to an offence. The section has clearly no reference to the present case.

Lastly, that the documents in question fall strictly within the language of S. 74 of the Evidence Act, seems to my mind to admit of no doubt. First as to the charge sheet, is it not a "record" of at least some of the investigating officer's acts? Again suppose it is not, is it not unquestionably *itself* a document forming *an "act"* of his, he being enjoined to act in a particular way, that is, submit such a report. The same remark applies to the report under section 157. Nor is it right to suppose there is no other "occurrence report" sent by the police to a Magitrate in the course of an investigation. For, according to the rules of the department a policeman making a search has to send one in respect of it to the Magistrate (Order No. 140 h., Police Orders, p. 80) and there is the inquest report prescribed by S. 174 of the Code. Copies of these are not unimportant to accused persons and it cannot be doubted that these reports are records of a public servant's acts within the meaning of S. 74.

For all the above reasons, I would answer the question submitted in the affirmative.

Benson J.:—The question for our decision is, as I understand it, whether a person who is named as accused of an offence, in a charge sheet forwarded by the police to a Magistrate is entitled before his trial to inspect and obtain copies of certain reports made by the police in connection with the case, *viz*:—(1) the occurrence report made under S. 157, Criminal Procedure Code; (2) the report made under S. 168, Criminal Procedure Code, by a subordinate police officer to the station house officer; and (3) the charge sheet drawn up under S. 173, Criminal Procedure Code.

It was, I understand, conceded that a copy of the Station House Officer's report made under S. 167, Criminal Procedure Code, could not be demanded, in as much as it is an extract from the police diary which is specially protected by S. 172, Criminal Procedure Code.

I am of opinion that the reference must be answered in the negative.

It is admitted that the right is nowhere given by any express legislative enactmemt; but it is argued that the reports in question are public documents within the meaning of S. 74 of the Indian Evidence Act; that every person interested in the subject matter of a public document has an inherent right to inspect it, and that, under S. 76 of the Indian Evidence Act, every person entitled to inspect a public document is also entitled to obtain a copy of it. It will be seen that the whole question depends on whether the documents in question are public documents within the meaning of S. 74 of the Indian Evidence Act. I do not think that they are. The only class of documents specified in that section within which they could fall is "documents forming the acts or records of the acts of executive officers." The police officers who send in these reports are, no doubt, public executive officers, but I do not think that these reports can, with any propriety, be regarded either as forming their acts or as the records of their acts. The diary of a police officer which is kept under S. 172, Criminal Procedure Code, is the record of his acts, in the popular sense of the word, in making an investigation under the Criminal Procedure Code. It sets forth his proceedings day by day in making the investigation and *inter alia* it must record "the time at which information reached him, the time at which he began and closed his investigation, the place or places visited by him and a statement of the circumstances ascertained through his investigation," but this diary is by S. 172 expressly protected from inspection by the accused and his agents. It may, I think, well be doubted whether the word "*acts*" in S. 74 is used in its ordinary and popular sense and not rather in the restricted and technical sense in which it is used in S. 78 of the Act, but in either case, I think that the reports in question are not, in any sense, records of the acts of the police officer. This will be clear if their contents, as prescribed by law are considered. The occurrence

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report (S. 157) is a report sent to the Magistrate that the officer of police suspects, on information or otherwise, that a cognizable offence has been committed in his jurisdiction, and if the police officer considers it unnecessary to investigate the case, it must state the reasons for such conclusion. It is not a record of his acts but a report of information to the Station House Officer of the "result of his investigation" into an alleged or suspected cognizable case. It is not the record of any act of the investigating officer. The charge sheet is the report sent to the Magistrate under S. 173 when an investigation has been completed. It must contain "the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case," and must state whether "the accused person has been forwarded in custody or has been released" on bail. This report is not the record of the acts of the police officer: It no doubt reports one act of the officer, *viz.*, whether he forwarded the accused in custody, or has released him on bail, but it is not the official record of that act. The record of the act is the proceedings in granting or refusing bail, not the report of those proceedings to the Magistrate. I conclude, then, that none of the reports in question are the acts or the records of the acts of the police officers within the meaning of S. 74 of the Indian Evidence Act. They are not, therefore, public documents, and the accused has no right to inspect them or to obtain copies of them.

So far I have referred to the reports as if they contained only the information which they are required by the Code to contain. As a fact, however, they have been enlarged so as to contain much more than the Code requires. For example, in both the occurrence report and the charge sheet there is a column in which is set forth, the name of the person by whom the information was given. S. 125 of Indian Evidence Act expressly provides that no Magistrate or police officer shall be obliged to state whence he received the information of any offence. In any view, therefore, an accused person could have no right to inspect or obtain a copy of that entry. So also in the occurrence report the names of persons inspected are entered, and in the charge sheet the houses searched and other particulars which may not concern the accused person at all are stated. It is obvious that he could have no right to obtain copies of such entries regarding third persons. If, however, the

accused person was entitled to obtain a copy of the reports so far as they concerned himself, I do not think that his right could be taken away by the insertion in them of particulars regarding third parties or matters not required by law to be mentioned in the reports. The Magistrate might, however, grant an extract of so much only as concerned the applicant and was not protected by law from disclosure.

It is argued that, if an order has been made on an occurrence report or charge sheet affecting an accused person, he is *ipso facto* entitled to a copy of the document under S. 548, Criminal Procedure Code. This will be so only if the Magistrate making the order is at the time a "Criminal Court."

It may, I think, be doubted whether a Magistrate (even when he has jurisdiction to try the offence) can be regarded as a "Court" before the trial commences. He is certainly not a "Court" when enquiring into offences which he is not empowered to try, *e.g.*, into Sessions cases (S. 19 Illustration (*d*) and S. 20, I. P. C.). In this large and important class of cases, therefore, S. 548 has no application. This, however, is not the question before us, and I need not pursue it further.

I am not aware of any statute or practice which enables an accused person in England to obtain, before his trial, copies of reports made by the Police in the course of their investigations. No doubt, the relations of the Police to the Magistracy in the two countries stand on a different footing, but it seems improbable that if the Indian Legislature intended to give an accused person access, before his trial, to the police reports connected with his case, this would not have been clearly laid down by law.

In my opinion, the alleged right is nowhere expressly conferred by law, nor can it be deduced from Ss. 74 and 76 of the Indian Evidence Act.

I would, therefore, answer the reference in the negative.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur Collins, *Kt.*, Chief Justice, and Mr. Justice Shephard.

Kanthimathinatha Pillai ... ... Appellant *

v.

Ramasami Pillai and others ... ... Respondents.

Kanthimathinatha Pillai *v.* Ramasami Pillai.

Will, construction of—Alienation, restriction against—Rents and profits, gift of—Gift of corpus.

A testator by his last will and testament directed that after his death the putta for a certain mittah should stand in the name of whoever was the eldest of his family, but that it should be enjoyed by his wife for life and that "he (the pattadar) should, after the death of my widow, divide the income of the zemin and give one share to my son K., one share to my grandson R., one share to my grandson S., and one share to grandsons N. and S. P. and that whoever superintends the mittah should take Rs. 15 a month for the expenses."

Held:—That on a true construction, the will made a bequest of the *corpus* of the mittah to the persons mentioned therein and not merely of the rents and profits thereof;

And that it contained no prohibition against alienation or partition of the mittah and that it was perfectly valid.

Second appeal against the decree of the District Court of Tinnevelly in A. S. No. 11 of 1895 confirming the decree of the Subordinate Judge of Tinnevelly in O. S. No. 25 of 1893.

One Ramasami Pillai died in 1886 leaving him surviving a widow, a son and grandsons by three other sons who had predeceased him. He left a will by which he made certain dispositions of a mittah belonging to him. The will ran as follows:—

"The Sillaraipuravu mittah, which fell to my share at the division between me and my sons, should be enjoyed by my wife Chellam after my lifetime. The puttah which now stands in my name for the mittah should after my death stand in the name of whoever is the eldest member of my family. He should, after the death of my widow, divide the income of the zemin and give one share to my son Kanthimathinatha Pillai, one share to my grandson Ramasami Pillai, one share to grandson Sankara Ramasami Pillai, and one share to grandsons Narayana Pillai and Subbaya Pillai. Whoever superintends the mittah should take Rs. 15 a month for the expenses."

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* S. A. No. 232 of 1896. 1st April 1897.

The plaintiff was one of the grandsons mentioned in the will and he brought the suit for one-fourth share of the entire estate against the son who, with the help of the widow who had recently died, had been treating the mittah as his sole property.

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The Subordinate Judge found the will to be invalid as containing provisions repugnant to Hindu Law, and on appeal the District Judge confirmed the decree of the Subordinate Court. The defendant then preferred this second appeal to the High Court.

The Officiating Advocate-General (V. Bashyam Aiyangar), P. S. Sivaswami Aiyar and *M. R. Ramakrishna Aiyar* for appellant.

C. R. Pattabhirama Aiyar for respondents.

The Court delivered the following:

JUDGMENT:—This is a perfectly simple case which has been unnecessarily complicated in the Courts below.

If the will is a valid one as we hold it to be, it is unnecessary to offer any opinion on the question of Hindu Law which the Subordinate Judge has discussed at needless length. The District Judge holds the will to be invalid, giving no reason of his own, but merely referring to the authorities mentioned by the Subordinate Judge.

The judgment of the Subordinate Judge is very puzzling, for in one part he inclines to the view that the will is valid, whereas in para. 17 he indicates the opposite opinion and even remarks that both parties equally challenge the will.

The suggestion that the will is invalid is put on two grounds: It is said that the intention of the testator was to keep the estate intact and to prevent any partition of it in the hands of his sons and grandsons. We do not think the will bears that construction. There are no words prohibiting the alienation or partition of the property. The testator probably expected that the estate would not be divided and made provision accordingly.. But it is another thing to say that he prohibited it. Then it is said that there was no gift of the corpus. The will is inartificially framed. It directs the division of the profits of the mittah into equal shares among his sons and grandsons. Following the decision in *Hemangini Dasi* v. *Nobin Chand Ghose,* I. L. R., 8 C., 801, in which the words

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used were much more dubious than they are here, we hold that it was the intention of the testator that the corpus should be distributed in the same proportion. It is further contended that there ought to have been a finding on the 5th issue. As to this it is sufficient to say that the alienees are not parties to this appeal and that this point was not argued in the lower appellate Court.

We dismiss the appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur J. H. Collins, *Kt.*, Chief Justice, and Mr. Justice Shephard.

Krishnammal ... ... { Appellant* (*Plaintiff*).

v.

Pichannavayyan and another ... ... { Respondents (*Defendants*).

Krishnammal v. Pichannavayyan.

Limitation Act, XV of 1877, Sch. ii., Arts. 142, 144—Discontinuance of possession—Adverse possession.

Discontinuance of possession takes place only when a person in possession goes out and is followed into possession by another.

A, the purchaser of a house from a junior member of a Hindu family, sued to recover possession of the house from the defendant who set up a title to it in himself and also pleaded limitation. It was found that the house belonged to the plaintiff's vendor's family, and was in the possession of the family anterior to 1880, that the plaintiff's vendor got an exclusive title to it under a partition-deed, dated 3rd November 1880, that at that time the house was in bad repair and was not occupied, and that A's vendor never entered into possession subsequently. The sale to the plaintiff was in November 1891 and the suit was filed in November 1892.

Held: that the *onus* lay on the defendant to show that the plaintiff's title became extinguished by adverse possession on his (defendant's) part for over 12 years before date of suit, and that as there was no such proof, the plaintiff's suit ought to be decreed.

Kashinath Sitaram Oze v. *Shridhar Mahadev Patankar*, I. L. R., 16 B., 343 distinguished.

Lakshman Vinayak Kulkarni v. *Bisansing*, I. L. R., 15 B., 261 referred to.

Second appeal against the decree of the District Court of Coimbatore in A. S. No. 173 of 1893, confirming the decree of

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* S. A. 1426/1895 9th February 1897.

the Court of the District Munsif of Udumalpet in O. S. No. 864 of 1892. Krishnammal v. Pichan-navayyan.

This was a suit for possession of a house from the defendants. The plaintiff purchased the house from the 1st defendant in November 1891. The house was then in the occupation of the 2nd defendant who set up a title to it in himself and also pleaded limitation. The Courts below had found that the 1st defendant while a minor divided from his uncles in November 1880, when it was that his exclusive title to the house accrued to him, that, previous to that, the house was in the possession of the family, that at the time of the partition the house was not occupied as it was in a state of bad repair and that subsequently neither the 1st defendant's guardian during his minority, nor the 1st defendant after coming of age, got into possession of the house. There was no evidence and no issue as to the title set up by the 2nd defendant. The Courts below, however, held that the suit was governed by Art. 142, Sch. ii, of the Limitation Act, and dismissed the plaintiff's suit as he failed to show that either he or his vendor was in possession of the house within 12 years prior to the date of the suit. The plaintiff then preferred this second appeal to the High Court.

C. R. Pattabhirama Aiyar for appellant.

K. Lakshmana Chetti for 2nd respondent.

The Court delivered the following

JUDGMENT :—The plaintiff's title being established, the only question is whether her right to recover the property she has purchased is barred by the Law of Limitation.

We understand it to be found as a fact that the plaintiff's vendor, or rather Sellammal, the mother and guardian of the plaintiff's vendor, was along with the vendor's uncle in possession of the property up to the date of the partition effected on the 3rd November 1880. It is not found that Sellammal was disturbed in her possession or excluded from it by the uncle after that date. The conclusion at which the District Judge arrives is that there was a discontinuance of possession owing to the fact that the house was in bad repair. The District Munsif seems to have been of the same opinion. We think that, having regard to the facts found,

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the Courts below were wrong in holding that the suit was barred by limitation. Discontinuance of possession takes place only when the person in possession goes out and is followed into possession by another. The conduct of Sellammal being explained by the condition of the premises, it cannot be said that, because she did not live in the house or exercise rights of ownership, she intended to give up possession. It is not alleged that she was excluded from possession as appears to have been the fact in the Bombay case cited by the District Judge.

The case of *Lakshman Vinayak Kulkarni* v. *Bisansing* in I. L. R., 15 B., 261, more clearly resembles the present. There it was held that Art. 144 of the Schedule to the Act applied and that, therefore, it was for the defendant to show that he had adverse possession for more than twelve years before the suit.

On the ground that there was no dispossession or discontinuance of possession on the vendor's part, and no such adverse possession proved on behalf of the 2nd defendant, we think that the suit was not barred by limitation, and accordingly reverse the decrees of the Courts below and decree for the plaintiff as prayed for with costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur Collins, *Kt.*, Chief Justice, and Mr. Justice Shephard.

Krishna Bhatta ... ... Appellant * (*Plaintiff.*)

v.

Subbaraya and others ... ... Respondents (*Defendants 1, 2 and 3*).

Krishna Bhatta v. Subbaraya.

Limitation—Appeal in *forma pauperis*—Payment of court fee after limitation and after rejection—Appeal referred by District Judge to Subordinate Judge—Subordinate Judge competent to decide whether appeal is in time—Madras Civil Courts Act IV of 1873, S. 13.

Where a District Judge refers an appeal preferred to him to a Subordinate Judge, the latter is the proper appellate court so far as that appeal is concerned, and the Sub-Judge has power to see whether the appeal is out of time and if so reject it notwithstanding the fact that the District Judge might have previously considered the same matter and come to a different conclusion.

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* C. M. A. 58 of 1896. 2nd April 1897.

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Jhotee Sahoo v. Omesh Chunder Sircar, I. L. R., 5 C., 1., dissented from.

A petition of appeal was presented in proper time. There was an enquiry into the appellant's pauperism and the petition was finally rejected. The appellant afterwards paid the necessary court fee, when the time for preferring the appeal had expired.

Held: that the payment of the court fee after the time had expired could not have retrospective effect and cannot relate back to the time when the pauper petition was filed and that the appeal was barred.

Appeal against the order of the Subordinate Judge's Court of South Canara, dated 4th November 1895, in A. S. No. 160 of 1895, remanding for hearing, O. S. No. 37 of 1894, on the file of the Court of the District Munsiff of Puttur.

The plaintiff sued to recover interest due under a hypothecation bond executed by the 1st defendant, father of defendants 2 and 3. The District Munsiff decreed the suit. The defendants preferred an appeal in *forma pauperis* to the District Court. This was done within the period allowed by the Law of Limitation for preferring appeals. The District Judge enquired into the pauperism of the appellant and rejected the pauper petition. The appellant then paid the necessary court fee; but then the period of limitation had elapsed. The District Judge, however, admitted the appeal and transferred it to the file of the Subordinate Judge for trial (apparently under the powers vested in him by the provisions of S. 13 of Act, III of 1873, Madras). The Sub-Judge on appeal reversed the decree of the Munsiff and remanded it for a retrial. On the question whether the appeal before him was itself barred, he said:—

The appellants presented their appeal in time to the District Court with an application to appeal in *forma pauperis*. After enquiry which occupied much time the District Judge refused leave to appeal in *forma pauperis* and rejected the appeal but agreed to admit it on payment of court fee. The appellants accordingly paid the court fee and the appeal was admitted but it was after the expiration of the period of limitation. The question is whether this Court has power to reject the appeal on the ground that it was presented out of time. The respondent's pleader relies on the ruling in *Bishnath Prasad* v. *Jagarnath Prasad*, I. L. R., 13 A., 305. In that case there was an application for review, then an application for revision to the High Court and the payment of stamp duty was made after the plaintiff was unsuccessful in all his attempts. Though the appeal was filed beyond time, the District Court having

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admitted it, this Court has no jurisdiction to cancel the District Court's order (I. L. R., 5 C., 1). When an appeal was presented in time but the stamp was affixed beyond time, it was held that the appeal was in time (*Patcha Saheb* v. *Sub-Collector of North Arcot*, I. L. R., 15 M., 78). I find that the appeal is in time.

The plaintiff then preferred this appeal against that order to the High Court.

K. Narayana Rao for appellant.

C. R. Pattabhirama Aiyar for respondents.

The Court delivered the following

JUDGMENT:—We have all the materials before us to form our opinion and have arrived at the conclusion that the District Judge acted illegally in admitting the appeal on the 12th June 1895. At that date the appeal was many months out of time and the affidavit shows no ground for excusing the delay. The Subordinate Judge considers that he was not entitled to question the order of the District Judge and relies on the case in I. L. R., 5 C., 1.

But seeing that the order was *exparte* and that the appeal was transferred by the District Judge to the Subordinate Judge, we think that upon that transfer all the powers of an appellate court became vested in the Subordinate Judge. Otherwise, an appeal would be partly in one court and partly in another.

We do not agree with the decision in *Jhotee Sahoo* v. *Omesh Chunder Sircar*, I. L. R., 5 C., 1. It is urged before us that the point of time cannot be taken on appeal from an order of remand, but, if the Subordinate Judge was wrong in entertaining the appeal, it is clear that he ought not to have made an order of remand.

We must allow this appeal and set aside the order of the Subordinate Judge and restore the decree of the District Munsiff with costs throughout.

Muthusubbia Chettiyar v. Rangiagoundan.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Benson.

Muthusubbia Chettiyar ... ... Appellant.*

v.

Rangiagoundan and others ... ... Respondents.

Guardian and ward—Alienation—Guardian's powers of alienation of ward's property.

The power of a guardian to alienate his ward's property is not co-extensive with that of a trustee; the former is more limited than the latter. A guardian can alienate only in cases of necessity or for an evident advantage to his ward.

The guardian of a minor advanced a sum of money belonging to his ward on the security of certain lands. Subsequently, at the request of the mortgagor, the guardian released a portion of the secured lands from liability under the mortgage, on the ground that the remainder of the property was ample security for the loan. Subsequently, the mortgagor mortgaged the portion so released to a third person who took the mortgage with knowledge of the previous mortgage and the release.

The minor coming of age sued the mortgagor and the subsequent mortgagee for the enforcement of the debt due to him against all the property originally mortgaged:

Held, that he had a right to realize his debt from all the property originally mortgaged.

Appeal against the decree of the Subordinate Judge's Court of Coimbatore in O. S. No. 19 of 1894.

The facts of the case appear sufficiently from the judgment of the Court.

P. S. Sivaswami Aiyar and *B. Venkatachala Mudaliar* for appellant.

S. Kasturi Ranga Aiyangar for 6th respondent.

M. R. Ramakrishna Aiyar for 8th respondent.

The Court delivered the following

JUDGMENT:—The guardians of the plaintiff, during the minority of the latter, lent 1st defendant a sum of Rs. 20,000 on the security of certain lands.

Subsequently, the guardians released a portion of the property from liability to the mortgage on the ground that the remainder

* Appeal No. 82 of 1896. 29th February 1897.

Muthusubbia Chettiyar v. Rangiagoundan.

of the property was ample security for the loan of Rs. 20,000. The property so released was subsequently mortgaged by the 1st defendant to the 14th defendant for Rs. 8,000. The minor, having afterwards attained majority, brought the present suit to recover his money by sale of all the lands originally mortgaged to his guardians, including the portion afterwards released by them and mortgaged to the 14th defendant. The 14th defendant contended that the lands mortgaged to him, having been released, were not liable for the plaintiff's debt. The Subordinate Judge disallowed this plea and gave plaintiff a decree against all the lands. Against this decree the 14th defendant now appeals. The question which we have to decide is whether the release granted by the plaintiff's guardians is valid and binding on the plaintiff? It is admitted that the release was not made on account of any necessity connected with the plaintiff's estate or for the purpose of securing any benefit to the plaintiff's estate, nor did it, in fact, secure any such benefit. It is also admitted that the 14th defendant took his mortgage with knowledge of the prior mortgage to the plaintiff and of the release.

The appellant's contention before us is that the plaintiff's interest in the land is limited to his right to recover the debt due to him, and that if it can be shown that the release has not substantially affected this right the remaining land being still security for the debt, the release should be held to be binding on the plaintiff. No direct authority in support of this proposition has been cited at the bar. We were, however, referred to certain observations by the author in Dart's Vendors and Purchasers, 6th Edition, page 689, with reference to the question whether trustees who are mortgagees can release a portion of the security without receiving any portion of the purchase money towards the reduction of the mortgage debt. His conclusion is that "where the trust instrument contains the usual power to vary securities, the preponderance of professional opinion is in favor of the absolute competency of trustees to release under such a power and of the right of a purchaser of a part of the land to assume that they used their power properly, and to abstain from making enquiries if there be nothing in the transaction suggestive of fraud." We were also referred to section 43 of the Indian Trusts

Act (II of 1882) which declares the powers of trustees to compound, release, and so forth.

It was argued that as the liabilities of a guardian are the same as those of a trustee, so his powers are also the same. We are unable to accede to this contention. No doubt, as a general rule, the guardian is liable to his ward as a trustee is to his beneficary but as regards the alienation of the ward's property the powers of the guardian are strictly limited by law. Even a guardian appointed by the court under the Guardian and Wards Act (VIII of 1890) cannot alienate in any way the ward's property without the previous permission of the court (section 29), and the power of the court is expressly limited to "cases of necessity or for an evident advantage to the ward," and it is obvious that what is denied to the court and to a guardian appointed by the court cannot be conceded to a guardian not so appointed, but acting as such under the ordinary law. It appears to us, therefore, that the powers of a guardian are not co-extensive with those of a trustee. The appellant also relied on *Temmakal* v. *Subbammal*, 2 M. H. C. R. 47, where it was observed that "all acts of the guardian, which are such as the infant might, if of age, reasonably and prudently do for himself, must be upheld when done for him by his guardian." These words must be understood with reference to the facts of the case, which related to the question of the guardian's power to submit to a caste panchayet a question of customary partition connected with the minor's estate. It may well have been for the advantage of the minor to have done so in that case, but the words quoted cannot be taken to completely define the powers of a guardian. The test whether the act was such as a man of ordinary prudence would do with reference to his own property should, we think, be confined to matters relating to "the realization, protection or benefit of the property" of the minor (section 27, Guardians and Wards Act). A release like the present, for which there was no necessity and from which the minor's estate derived no benefit, does not fall within this category. It is obvious that such a release may, in many unforeseen ways, prove to be eventually injurious to the minor, though at the time it may appear unlikely to be so. Property is liable to deteriorate in value, and what is ample security to-day may become insufficient with lapse of time. To lay down that security once acquired for the minor's property may, at the

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mere discretion of the guardian and without benefit to the minor, be diminished, from time to time, to what the guardian considers sufficient, would be to introduce a rule for which there is no authority, and which would certainly, in many cases, prove detrimental to the interests of the minors.

We think that, in all cases where such release is made, it must in law be held to be necessarily prejudicial to the minor without attempting to estimate the precise extent of the ultimate injury which may actually result.

We do not think that, so far as the present question is concerned, any sound distinction can be drawn, as the appellant wishes us to do, between the interest possessed by a minor in property belonging to him as his own and the limited interest possessed by him in property mortgaged to him. His interest is entitled to equal protection in both cases. Without, therefore, going into the question of the sufficiency of the security apart from the property released, we hold that the plaintiff's right to proceed against the whole property is unaffected by the release.

We have been asked at least to direct that the sale of the appellant's property should be postponed until the plaintiff had proceeded against the remainder of the security. We, however, find that the appellant's property has been already sold, and that the sale has been confirmed, and suits for contribution between the subsequent mortgagees have been instituted.

We think that, in these circumstances, it is too late to modify the decree as suggested, even if it could have been done in the lower Court without prejudice to the rights of the other subsequent mortgagees.

We must, therefore, dismiss the appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Subrahmania Aiyar.

Palaniappa Chetty ... ... Petitioner (*Plaintiff*)*

v.

Avatharaman and others ... ... Respondents (*Defendants*).

Palaniappa *v.* Avatharaman.

Succession Certificate Act, VII of 1889, S. 4—Suit by a Hindu on a bond executed in the name of his deceased father—Debt of joint family.

Where a Hindu sues upon a bond executed in the name of his deceased father, the presumption of law, in the absence of any admission or evidence to the contrary, is that the debt due under the bond is one due to the joint family. No succession certificate need be produced in respect of such debt.

Petition, under S. 25 of Act IX of 1887, praying the High Court to revise the order of the Subordinate Judge's Court of Madura (East), dated 15th September 1893, in Small Cause Suit No. 403 of 1893.

The plaintiff sued upon a debt bond executed by the 1st defendant in the name of his deceased father. The Munsiff dismissed the suit on the ground that a succession certificate was not produced by the plaintiff for the debt in question in accordance with the provisions of Act, VII of 1889. The plaintiff then got a certificate and applied for a revision of judgment which the Munsiff refused to grant. The plaintiff thereon preferred this petition under S. 25 of Act, IX of 1887, to revise the decree of the Munsiff.

P. R. Sundara Aiyar for petitioner.

The respondents were not represented.

The Court delivered the following

JUDGMENT :—The plaintiff sues upon a bond executed to his deceased father. In the absence of any admission or evidence to the contrary, the presumption is that the debt was one due to the family, and no certificate of heirship was necessary to enable the plaintiff to recover the debt.

I set aside the order of the Subordinate Judge and direct the suit be restored to the file and dealt with according to law. Costs to abide and follow the result.

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* C. R. P 237 of 1894. 30th March 1896.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Benson.

Pichuvayyan ... ... Appellant* (*Plaintiff*)

Vilakudiyan ... ... Respondent (*2nd Deft.*)

Pichuvayyan v. Vilakudiyan.

Reg. VI of 1831 (Madras), Ss. 1 and 3—Village Blacksmith's inam—Suit not cognizable by civil courts—Limitation Act, S. 28.

Blacksmiths' and carpenters' inams are also within the purview of Reg. VI of 1831 (Madras).

Rights to property which cannot be enforced in civil courts by reason of Reg. VI of 1831, are not extinguished under S. 28 of the Limitation Act, XV of 1877, as the latter Act does not prescribe any period of limitation for suits under the Regulation aforesaid.

Second appeal against the decree of the District Court of Madura in A. S. No. 178 of 1895 reversing the decree of the Court of the District Munsiff of Sivaganga in O. S. 481 of 1894.

The plaintiff sued to eject the defendants from the plaint land and to recover possession with damages in the shape of mesne profits for three years. The property belonged to the family of the defendants and was mortgaged with possession by their ancestors in 1857 to one Thothan for family necessity. The plaintiff took a sub-mortgage of the same with possession from Thothan in 1862 and was in possession of it and enjoying the same since that period. While so, the defendants in collusion with the plaintiff's tenants got into possession and refused to deliver the land to the plaintiff. Hence the suit. The defendants among other pleas (which were all found against) contended that the property was service *maniam* attached to the office of Village Blacksmith of which the 2nd defendant was the holder for the time being and that as such *maniam* it was inalienable under Reg. VI of 1831. He further contended that the suit was not cognizable by civil courts under the provisions of the same Regulation.

The District Munsiff decreed the plaintiff's suit. On the contention raised by the defendants based on the Regulation he raised the following issue "Is the mortgage valid in law, the lands

* S. A. No. 290 of 1896. 6th April 1897.

admittedly being service *maniam* " and gave the following finding on it :— Pichuvayyan v. Vilakudiyan.

"It is possible that the mortgage may not be binding on the grantors when they resume the *maniam* on the ground of the servant's failure to do the work. The mortgage is clearly valid against the mortgagor and his representatives in interest who are estopped from questioning its validity."

The 2nd defendant then appealed to the District Court and the District Judge held that civil courts were precluded under Regulation VI of 1831 from taking cognizance of the present suit and so reversed the decree of the Munsiff and dismissed the suit. The plaintiff then preferred this second appeal to the High Court.

R. Kuppusami Aiyar for appellant.

Reg. VI of 1831 has no application to the present case. The post of a Village Blacksmith is not an 'office' within the meaning of the Regulation. There are no duties attached to it which can be enforced at the instance of any particular individual or individuals. Even if it be held to be an 'office' it is not an 'office' either in the 'Revenue' or 'Police' departments to which alone the Regulation extends. The Court below is wrong in its interpretation of S. 3 of the Regulation. Under that section it is only claims to possession of hereditary village offices in the Revenue or Police departments or to the emoluments to such offices by virtue of a right to such offices, that are excluded from the cognizance of civil courts. The plaintiff's suit is not one to enforce a claim either to hold such office or to enjoy the emoluments of the office as emoluments and consequently is not covered by S. 3. The alienation may not be binding on the grantors when they resume the *maniam*, but it is perfectly valid and binding as between the parties and the defendants are estopped from disputing the plaintiff's title after such a long period as thirty years. Whatever may be the character of the plaint lands, the plaintiff's suit ought to be decreed as he has prescribed for a mortgage by adverse possession for over thirty years. If the mortgage to the plaintiff was originally invalid then his possession became adverse from the date of the mortgage. *Madhava* v. *Narayana*, I. L. R., 9 M., 244; *Radhabai and Ramachandra Konher* v. *Anantrav Bhagvant Deshpande*, I. L. R., 9 B. p. p. 198, 227, 231, 232.

V. C. Desikachariar for respondent.

Pichuvayyan v. Vilakudiyan.

The Court delivered the following

JUDGMENT:—Blacksmiths' and carpenters' inams are within the purview of Regulation VI of 1831 (Letter from Sadar Adalat to Government, dated 30th June 1852, and *Palamalai Padayachi* v. *Shanmuga Asari*, I. L. R., 17 M., 302). The plaintiff did not allege in his plaint a title by adverse possession for over 12 years, nor was there any issue on such plea. Moreover as the plaintiff could have sued only under Regulation VI of 1831 in a Revenue Court, but not in a Civil Court for recovery of the inam land and as the Indian Limitation Act does not prescribe any period of limitation for suits under the Regulation, the plaintiff could not under S. 28 of the Act acquire a title by prescription.

The second appeal, therefore, fails and is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur Collins, *Kt.*, Chief Justice, and Mr. Justice Shephard.

Purnamal Chund ... ... Appellant* (*3rd Defendant*).

v.

Venkata Subbarayadu Reddiar. Respondent (*Plaintiff*).

Purnamal Chund v. Venkata Subbrayadu.

Mortgagor and Mortgagee—Priority of subsequent mortgage—Subsequent mortgagee paying off decree on prior mortgage—Intention, evidence of.

Certain property was first mortgaged to A in 1887, and then to B in 1890. Both A & B sued the mortgagor on their respective mortgages and got the usual decrees. After those decrees had been passed against the property, C advanced money to the mortgagor and took a mortgage in his name in 1891. Part of this money went in discharge of A's decree debt. It was proved that C when he advanced the money intended part of it for the discharge of A's decree debt, and intended also to keep alive A's mortgage. In a suit by C for the realization of his mortgage amount.

Held: that he was entitled to priority over B's decree to the extent of the amount advanced by him for the discharge of A's decree debt.

Adams v. *Angell*, 5 Ch. D. 645, referred to (vide *Subbaraya Chetti* v. *Ganga Razulungaru*............ 7 M. L. J. p. 18.)

Second appeal against the decree of the District Court of Chingleput in A. S. No. 62 of 1894, confirming the decree of the

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* S. A. 1427 of 1895. 19th February 1897.

Purnamal Chund v. Venkata Subbrayadu.

Court of the District Munsiff of Poonamallee in O. S. No. 230 of 1892.

Plaintiff sued to recover the sum of Rs. 2,150 being the principal and interest due under a mortgage bond for Rs. 2,000 executed by the first and second defendants on the 15th December 1891. He stated that out of this sum Rs. 1,211 went in discharge of two decrees which were outstanding against the mortgaged property at the time of his mortgage and that these decrees had been obtained upon mortgages of 1887, in respect of the same property. On the date of the plaintiff's mortgage the third defendant was holding a decree against this very property, but his decree was upon a mortgage of 1889. The plaintiff contended that he was entitled to priority over the third defendant's decree to the extent to which his money had gone in satisfaction of the decree amount stated above.

The Munsiff found that out of the amount advanced by the plaintiff only Rs. 1,150 went in discharge of the previous decree debt and that the plaintiff was entitled to priority to that extent over the third defendant who had only a mortgage of 1889. On the latter question he gave judgment as follows :—

"The answer to the question depends upon the further question whether plaintiff intended to keep the prior mortgage in favour of Muttiyalu Reddi alive, for his own benefit. The presumption is that he did intend and, as far as I can see, there is nothing in the circumstances of the case to shew the contrary; and the presumption is supported by the fact, disclosed in the above correspondence, that plaintiff was, all along, most solicitous about ascertaining if any prior mortgages on the property existed; and it is immaterial whether plaintiff had or had not notice of the third defendant's mortgage. (*Gangadhara* v. *Sivarama*, I. L. R. 8 M., 246.) It is argued for the defence, that the presumption would arise only if the plaintiff paid the money direct to the original mortgagee—and not, as in the present case, to the mortgagor. I do not think that this makes any difference."

The third defendant preferred an appeal to the District Court and the District Judge found upon the evidence as a question of fact that the plaintiff advanced the money with the intention of keeping alive the prior mortgages and that the money that he advanced did actually go in satisfaction of the decree debts due

Purnamal Chund v. Venkata Subbrayadu.

on the prior mortgages. He, therefore, confirmed the decree of the Munsiff. The third defendant then preferred this second appeal.

C. Sankara Nair for appellant.

C. Ramachandra Rao Saheb for respondent.

The Court delivered the following

JUDGMENT:—The respondent, plaintiff, seeks to enforce a mortgage executed in his favour on the 15th December 1891. The sum of Rs. 1,150, part of the sum advanced by him was, it is found, advanced and actually paid for the amount due under a decree dated the 20th March 1890, obtained by one Subba Reddi on a mortgage in his favour executed in the year 1887. The appellant was the holder of an intermediate incumbrance, dated the 4th February 1890 upon which also a decree was obtained on the 4th November 1890. Prior to the date of the respondent's mortgage, there were, therefore, two mortgage decrees in existence, the earlier one in favour of Subba Reddi, the later in favour of the appellant. It is found as a fact that the respondent, when advancing Rs. 1,150 for the discharge of the earlier decree, intended to keep alive the prior incumbrance, and it has been held that he is to that extent entitled to priority as against the appellant whose incumbrance is intermediate in point of time.

On the hearing of the appeal, it was argued before us that inasmuch as Subba Reddi's mortgage had become merged in the decree passed upon it and that decree had been satisfied, the intention of keeping it alive for his own benefit could not properly be imputed to the respondent. Notwithstanding the opinion to the contrary expressed in the unreported case,* we are of opinion that the principle on which the respondent bases his claim to priority is not affected by the circumstance that the money advanced by him was advanced in order to pay off a mortgage debt due under a decree. It is sufficient for the respondent to show that there was a subsisting prior incumbrance, that his money was lent for the purpose of discharging it and that it was for his benefit that the prior incumbrance should still be kept alive. It cannot be said that he had any the less a right to keep the incumbrance

* *Subbaraya Chetti* v. *Ganga Razulungaru*, 7 M. L. J. 18.

alive, because it had taken the form of a decree. The same thing had happened in the case of *Adams* v. *Angell*, 5 Ch. D. 645. Nor can it be said in the present case that the respondent did any thing which could seem to negative an intention on his part to adopt the course which it was obviously for his benefit to adopt. Purnamal Chund *v.* Venkata Subbrayadu.

The appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Benson.

Subbarayar and others ... Appellants* (*Plaintiffs* 1, 2, 3 *and* 5)

v.

Upadesiyar and another ... Respondents (*Defts.* 1 *and* 2).

Madras Revenue Recovery Act, II of 1864, S. 38—Revenue purchase—Benami, proof of. Subbarayar *v.* Upadesiyar.

S. 38 of the Revenue Recovery Act, II of 1864 (Madras), does not preclude proof being given that the person whose name is entered in a Revenue sale certificate is not the person, or the only person, who acquired a right under the purchase as vide nced by the certificate.

Second appeal against the decree of the Subordinate Judge's Court of Tinnevelly in A. S. No. 48 of 1894, confirming the decree of the Court of the District Munsiff of Tuticorin in O. S. No. 425 of 1891.

This was a suit for the recovery of certain lands with mesne profits from the possession of the defendants. The plaintiffs stated that their father purchased the lands in dispute at a revenue auction sale on the 28th October 1879, that possession was not taken immediately, and that the 1st defendant and his sons (the 2nd and 3rd defendants) have been in unlawful possession of the property and preventing the plaintiffs from taking possession of the same. The suit was brought in 1891, just before the period of limitation elapsed. The case of the defendants was that the purchase in the name of the plaintiffs' father was made on behalf of himself, the defendants and other shareholders of their village, and

* S. A. No. 278 of 1896. 31st March 1897

Subbarayar v. Upadesiyar.

that they were jointly interested with the plaintiffs in the property in dispute.

The Courts below found the contention of the defendants to be true and dismissed the plaintiffs' suit. On the question, whether the defendants could show that the sale of the land to the plaintiffs' father was benami for others, the Sub-Judge gave the following finding :—

" The provision in clause 5 of S. 38 of Madras Act, II of 1864, that the certificate 'shall be conclusive evidence of the fact of the purchase in all courts and tribunals when it may be necessary to prove the same' can mean no more than what the words actually convey and cannot relate to any matter which it was not the object of the Legislature to cover by it. The point dealt with by the provision is only the measure and mode of proof as to the fact of purchase. As to that the Legislature thought it fit to lay down that the certificate should be deemed conclusive proof of the purchase. That is, where the certificate is produced, the Court must presume that a sale and purchase of the sort were made. But this provision by no means warrants the supposition that the Legislature meant to go so far as to strike at the root of the secret, subsidiary or trust-born rights. If, for instance, the certificate is taken out in the name of one of the co-parceners of a joint Hindu family, or in that of one of the members of a firm of partners, can it be said that the other co-parceners or partners can urge and establish no right to the property purchased ? It seems to me obvious that such a contention will not hold water for one moment. Or suppose the contest was whether or not the interest of other persons besides the defaulter passed by the sale. Can it be contended that the sale certificate is conclusive evidence on the point ? I trow not. All that can be said in such a case, is that the ostensible purchaser is that person who gave himself out as the purchaser and in whose name the certificate was issued. But the certificate could not clothe the purchaser with an absolute right against all the world, in spite of co-ownership, relations of trust and such like rights, existing in other individuals. Where the Legislature intended to preclude the setting up of a benami purchaser, it has taken care to express its intention in express and unambiguous language—*vide* the provision in S. 317 of the Civil Procedure Code. Even as regards that enactment, it is well-known that numerous exceptions have been engrafted on it, so as not to defeat the rights of other persons founded on trust, co-parcenary. There is also an express ruling if one were wanted—See *Fazal Rahaman* v. *Imam Ali*, I. L. R., 14 C., 583—

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that this provision cannot be extended to sales not held under the Civil Procedure Code, and there is no positive law in the case of other sales, debarring proof of the existence of a contract to buy in the name of one for the benefit of others also. It seems to me that the matter is a pretty plain one, and I need not, therefore, dilate further on the subject."

V. Krishnaswami Aiyar for appellants.

R. Sivarama Aiyar for 1st respondent.

The Court delivered the following

JUDGMENT:—It is contended that, as the plaintiffs' father purchased the land at a sale for arrears of revenue, S. 38 of Act II of 1864 (Revenue Recovery Act) precludes the defendants from proving that the purchase was really made by the plaintiffs' father, not solely on his own behalf, but on behalf of the villagers generally. The words of S. 38 are "such sale certificate shall state the property sold and the name of the purchaser, and it shall be conclusive evidence of the fact of the purchase in all courts and tribunals, where it may be necessary to prove the same, and no proof of the Collector's seal or signature shall be necessary, unless the authority before whom it is produced shall have reason to doubt its genuineness."

The intention clearly was to prevent any plea from being raised that the defaulters' interest did not pass by the sale. There is nothing in the language of the section to warrant the contention that the Legislature intended thereby to preclude proof being given that the person, whose name was entered in the certificate, was not the person, or the only person, who acquired a right under the purchase. Where this was intended, the Legislature has made a distinct provision to that effect as in S. 317, Civil Procedure Code.

The evidence objected to was, therefore, rightly admitted, and upon the findings the suit was rightly dismissed.

We dismiss the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Benson.

Venkataramayya and another ... Appellants * (*Plaintiffs*)

v.

Venkatalakshmamma ... Respondent (*Defendant.*)

Venkataramayya *v.* Venkatalakshmamma.

Hindu Law—Reversioner's suit to recover property after the death of intervening female owner—Limitation Act, Sch. ii, Arts. 141, 144.

A, a Hindu, died in 1880 leaving him surviving a daughter as his only heir. But immediately after his death his daughter-in-law (the widow of his son who had pre-deceased him) got into possession of his property and held it adversely to the daughter. The daughter died in 1889. In a suit brought by the daughters' sons in 1893 to recover the property from the possession of the daughter-in-law:

Held, that Arts. 141, 148, Sch. ii of the Limitation Act applied; and that the suit was not barred by limitation.

Srinath Kur v. *Prosunno Kumar Ghose*, I. L. R., 9 C., 934, F. B.; *Sham Lall Mitra* v. *Amarendro Nath Bose*, *Ib.* 23 C., 460; *Cursandas* v. *Vundravandas*, *Ib.* 14 B., 482; *Mukta* v. *Duda*, *Ib.* 18, B., 216; *Tai* v. *Ladu*, *Ib.* 20 B., 801; *Ram Kali* v. *Kedar Nath*, *Ib.* 14 A., 156, followed.

Lachhan Kunwar v. *Manorath Ram*, I. L. R., 22 C., 445, distinguished.

Second appeal against the decree of the District Court of Cuddapah in A. S. No. 20 of 1895, reversing the decree of the Court of the District Munsiff of Madnappale in O. S. No. 613 of 1893.

This was a suit to recover possession of a house and some lands from the defendant. The plaintiffs were the reversioners (the first plaintiff being a daughter's son and 2nd plaintiff another daughter's grandson) to the estate of one Appagi who died in 1880. After Appagi's death his property was taken possession of by the defendant, his daughter-in-law (the widow of his son who had pre-deceased him). One of the two daughters of Appagi died

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* S. A. No. 275 of 1893. 29th March 1897.

during his lifetime, but the other survived him and died in 1889. The plaintiffs brought their suit in 1893 to recover possession of the property of Appagi. The defendant among other things pleaded limitation. The Munsiff found that the defendant got into possession immediately after Appagi's death and held the property adversely both to the surviving daughter and the plaintiff; but he held that Art. 141 of the Limitation Act applied and decreed the suit. On appeal the District Judge also confirmed the finding as to the possession of the defendant, but he held that as the daughter represented the estate in law, possession against her was enough to set limitation run against the reversioners also. He accordingly dismissed the plaintiff's suit. The defendant then preferred this second appeal.

C. Ramachandra Rao Saheb for appellants.

C. Mahadeva Aiyar and *C. Ramachandra Rao* for respondent.

The Court delivered the following

JUDGMENT :—The District Judge while stating the law correctly has failed to properly apply it.

The last male owner died in 1880, and the defendant at once took possession of the property. The last male owner's daughter, who was the party entitled to possession, died in 1889. The present suit by the reversioners to recover possession was filed in 1893. Under Article 141, Schedule ii of the Indian Limitation Act, XV of 1877, the reversioners had 12 years from the date of the daughter's death, and their suit was therefore clearly in time (*Srinath Kur* v. *Prosunno Kumar Ghose*, I. L. R., 9 C., 934 F. B.; *Sham Lall Mitra* v. *Amarend Nath Bose, Ib.* 23 C., 460; *Cursandas* v. *Vundravandas, Ib.* 14 B., 482; *Mukta* v. *Dada, Ib.* 18 B., 216; *Tai* v. *Ladu, Ib.* 20 B., 801; *Ram Kali* v. *Kedar Nath, Ib.* 14 A., 156). The respondent relies on the Privy Council case reported in *Lachhan Kunwar* v. *Mano Rath Ram,* I. L. R., 22 C., 445. If that case was a decision with reference to Article 141, Schedule ii of the present Act (XV of 1877) or the corresponding Article of Act IX of 1871,

it would be in point; but there is nothing to show that it is so, and the dates in the recital of facts lead us to the conclusion that the rights of the reversioners in that suit had become barred under Act XIV of 1859, before the provisions of Act IX of 1871 came into force.

We must, therefore, reverse the decree of the District Judge and restore the decree of the District Munsif. The appellants must have their costs in this and the lower appellate Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Benson.

Bulasami Pandithar ... ... Appellant,* (*3rd Defendant*)

v.

Narayana Rao ... ... Respondent (*Plaintiff*).

Hindu Law—Mitakshara—*Bandhus exparte paterna* preferred to *exparte materna*—Sapindaship mutual. Bulasami Pandithar *v.* Narayana Rao.

According to the Hindu Law of the Mitakshara school the son of the adopted son of a sister is a nearer *bandhu* and heir to a deceased Hindu than the son of his maternal uncle.

The following rules hold good in determining priority of relationship among heirs of the same class in the Mitakshara school:—

1. The nearer line excludes the more remote.

2. Heirs *exparte paterna* take before heirs *exparte materna.*

3. In establishing his priority a plaintiff has only to establish that he is the nearest heir to the deceased; it is not necessary for him to go further and show that the deceased is also his nearest heir.

4. Where no other definite rule can be gathered from the leading treatises of the Mitakshara school, a rule of preference may be based on the relative spiritual benefits conferred by the various competitors on the deceased and his ancestors.

Appeal against the decree of the Subordinate Judge's Court of Kumbakonam in O. S. No. 56 of 1894.

The facts of the case appear sufficiently from the judgment of the Court.

P. S. Sivaswami Aiyar for appellant.

C. R. Pattabhirama Aiyar for respondent.

The Court delivered the following

JUDGMENT:—This is a suit for a declaration that certain alienations made by the 1st defendant, the widow of one Vasudeva Pandithar, are not binding upon the plaintiff (respondent) as the nearest reversionary heir of Vasudeva. The 3rd defendant (appellant) also claims to be Vasudeva's nearest heir. There is no dispute in this Court as to the actual relationship of these parties to Vasudeva. The plaintiff is the son of the maternal uncle of Vasudeva and the 3rd defendant is his sister's adopted son's son.

* A. No. 44 of 1896. 20th July 1897.

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As to the plaintiff, it is not denied that he belongs to the first of the three classes into which *bandhus*, or cognate kindred entitled to inherit the estate of a deceased man, are divided, *viz.*, his own or *atma bandhus*, his father's or *pitr bandhus* and his mother's or *matr* bandhus, inasmuch as the plaintiff is a relation of the exact description specifically mentioned by Vijnaneswara as an *atma bandhu* (Mitakshara Chap. II, Sec. VI, V, I). As to the 3rd defendant, the learned vakil for the plaintiff urges that he is not Vasudeva's *atma bandhu*. But that he is such a bandhu seems to be necessarily implied by the passage of the Mitakshara cited above. For it lays down that the father's sister's son—that is a descendant of even the paternal grandfather, is an *atma bandhu*. How then can a *bandhu*, like the 3rd defendant, who is able to trace his relationship to the deceased owner through a nearer ancestor, *viz.*, the father, be held to be other than an *atma bandhu?* The plaintiff's objection on this point is, consequently, untenable.

The substantial question for determination is which of the two *atma bandhus* (whose rights are admittedly not equal) has the preferential title to the estate of Vasudeva?

The plaintiff's claim to such title was sought to be supported by two arguments. The first argument was this: Vasudeva was the *atma bandhu* of the plaintiff while he was only the *pitr bandhu* of the 3rd defendant; and the plaintiff's propinquity to Vasudeva should, therefore, be held to be greater than that which subsisted between Vasudeva and 3rd defendant. No decision or authoritative text was, however, cited in support of this argument. Since the question here is as to the title of the plaintiff to come in as the heir of Vasudeva, not as to Vasudeva's title to take the estate of the plaintiff had the former been the survivor, the fact so much relied on, on behalf of the plaintiff must be treated as irrelevant to the exact point in issue, and consequently, cannot be held to confer on the plaintiff a right to succeed in preference to the 3rd defendant.

The second argument on behalf of the plaintiff was that the 3rd defendant could not and did not confer any religious benefit on Vasudeva, while the plaintiff could and did confer such benefit, and therefore the plaintiff has the better claim.

In the argument this was discussed with reference to Vasudeva's participation in the offerings of cake and water made

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periodically by the plaintiff to two of the paternal ancestors and also with reference to the question whether either party or both were competent to perform the obsequies of Vasudeva in the absence of nearer relations.

Now with reference to the 1st of the abovementioned matters, the plaintiff's paternal grandfather and great-grandfather, to whom he has to present cake and water at stated times, being Vasudeva's maternal grandfather and great-grandfather respectively, were as such entitled to similar oblations from Vasudeva also, who consequently participated in the offerings made by the plaintiff to those common ancestors. But on the other hand as between the 3rd defendant and Vasudeva, there was no possibility of similar participation, since none of the persons to whom the 3rd defendant has to make offerings were entitled to like dues from Vasudeva.

Next with reference to the 2nd matter, *viz.*, eligibility to perform the obsequies of Vasudeva, on behalf of the plaintiff, no text expressly mentioning the son of the maternal uncle of a man as among those competent to celebrate that man's funeral rites were cited. But on behalf of the 3rd defendant, a text quoted in Kamalakara's Work on Ceremonial Law, the Nirnaya Sindhu, was relied on. The Subordinate Judge suggested there was some mistake in the reading of the quotation in question. This view, however, seems to be scarcely well founded inasmuch as the principle circumstance relied on by the Subordinate Judge in favour of that view, *viz.*, that no other known text refers similarly to the competency of a sister's grandson is rather a slender foundation for the suggestion.

In these circumstances, it is not on the whole easy to lay down positively that, in a spiritual point of view, the difference between the two claimants is of a very pronounced character and that the plaintiff's capacity to confer religious benefits upon Vasudeva decidedly preponderates. But, granting as the Subordinate Judge seemed disposed to hold though not very confidently, that the plaintiff's capacity is superior, does that give him a better title? Now, though the doctrine of religious benefit has exercised very much influence upon many of the great writers on Hindu Law, yet it is now rightly recognized that Vijnaneswara as well as most of his followers put their system on a radically different basis (See

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Mayne's Hindu Law, Ss. 2 and 468 to 478 and *Subba Singh* v. *Sarafraz Kunwar*, I. L. R., 19 A., 215).

At the same time it must be admitted that a high authority of the same school—the Viramitrodaya—has given countenance to the view that the doctrine of religious benefit is not without its applicability even under the Mitakshara system (Chapter II, Part I, Sec. 2, page 158, Golap Chander Sircar's Translation). In the Allahabad case just referred to, *Knox*, J., seemed inclined to hold that the doctrine of the Viramitrodaya is not entitled to any weight (pp. 226-7), but Bannerji, J., is not inclined to go that length (p. 229). In this Court the doctrine was, not long ago, referred to and relied on, in support of the proposition that, as between *bandhus* of the same class, a rule of preference may be found in the spiritual benefit which they confer (*Muttusami* v. *Muttu Kumarasami*, I. L. R., 16 M., at p. 30). It may, therefore, perhaps be unsafe to hold that the doctrine in question can never be resorted to in dealing with difficult questions arising under the Mitakshara Law for the solution of which no definite rule is stated expressly or by implication in the leading treatises of that school. But be this as it may, there need be no hesitation whatever in saying that the doctrine ought not to be resorted to in derogation of the great principles pervading the Law of Inheritance under the Mitakshara system. The first of such principles is that the nearer line excludes the more remote. Applying it here, the plaintiff must doubtless fail, since he traces his right as a *bandhu* through Vasudeva's grandfather (maternal), while the 3rd defendant makes out his right through a nearer ancestor of Vasudeva, *viz.*, his father. The learned Vakil for the plaintiff laid considerable stress on the fact that the plaintiff is the grandson of Vasudeva's maternal grandfather, whereas the 3rd defendant is the great-grandson of Vasudeva's father. But it is not easy to see how this difference in the respective relationship affects the question under consideration. For the competition here is not between persons descended from the same man, but between those who are seeking to establish their rights through different persons, one of whom is unquestionably a nearer ancestor of the *propositus* than the other, and whose line consequently must take precedence. If a more familiar illustration in support of so elementary a proposition were necessary, it is sufficient to refer to the case of a man dying

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leaving a divided nephew and a divided uncle. The nephew excludes the uncle though the former is more removed from the *propositus's* father than the latter is from the *propositus's* grandfather; the father and the grandfather being of course the respective common ancestors through whom the nephew and the uncle must respectively trace their right to inherit.

Another fundamental principle of the law in favour of the 3rd defendant's preferable right is that among *bandhus* of a class those who are *exparte paterna* take before *bandhus exparte materna.* It is scarcely necessary to point out that though the mother's propinquity to her son is under the Mitakshara greater than that of the father, yet in the language of Saraswathi Vilasa "the greater eligibility belongs to the mother alone, and not to the mother's *bandhavas*" (paragraph 598, Foulkes' Translation) and this Court's ruling on the point in *Sundrammall* v. *Rangasami Mudaliar*, I. L. R., 18 M., 193, renders it superfluous to cite other authorities respecting it.

On both the above grounds, therefore, it is perfectly clear that the 3rd defendant is a nearer reversionary heir of Vasudeva than the plaintiff; and as there was no allegation or proof of the existence of any circumstances which would entitle the plaintiff to maintain the declaratory suit as a remote reversioner, the suit must fail on this preliminary ground.

The appeal is accordingly allowed, the decree of the Subordinate Judge is therefore reversed and the suit dismissed with costs of the 3rd defendant in this and the lower Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur Collins, *Kt.*, Chief Justice, and Mr. Justice Benson.

Imbichi Mamad ... ... Petitioner * (*Plaintiff*)

v.

Manavikramasamathripad and others. } Respondents (*Defendants*).

Imbichi Mamad v. Manavikramasamathripad.

Voluntary payment—Rent, payment of, by person lawfully in possession—Liability of owner benefited to pay back.

The interest of a Malabar tarwad in certain lease-hold property was purchased by the plaintiff in a sale held in execution of a decree obtained against the karnavan.

* C. R. P. No. 477 of 1895. 26th October 1896.

Imbichi Mamad v. Manavikrama-samathripad.

The plaintiff got into possession of the property, and during his possession paid rent to the landlord. Subsequently, the members of the tarwad sued to set aside the sale to the plaintiff and recovered possession. The plaintiff now sued the landlord and the members of the tarwad including the karnavan for the recovery of the rent paid by him during his temporary possession.

Held: that the landlord was not liable to pay back the rent paid to him by the plaintiff; and that the tarwad was liable to pay the same to the plaintiff subject to his accounting for the mesne profits realized by him.

Dakhina Mohan Roy, v. *Saroda Mohan Roy*, I. L. R., 21 C., 142, followed.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Subordinate Judge's Court of Calicut in small cause suit No. 28 of 1895.

This was a suit to recover Rs. 273-13-8, being the arrears of rent, &c., paid by plaintiff to 1st defendant's devaswam. The land for which the rent was paid by plaintiff had been originally demised by the 1st defendant to the 2nd defendant's tarwad and was afterwards sold at a court-sale in execution of a decree against the 2nd defendant and purchased by the plaintiff. The plaintiff took possession of the land, and while in such possession paid rent to the 1st defendant. Subsequently, the sale was set aside and the property taken back from the plaintiff by the 2nd defendant's tarwad. The plaintiff now sued to recover from the landlord and the 2nd defendant and all the members of his tarwad, the rent that he had paid. The Sub-Judge following *Tiluck Chand* v. *Soudamini Dasi*, I.L.R., 4 C., 566, dismissed the plaintiff's suit. The plaintiff then preferred this revision petition to the High Court.

K. P. Sankara Menon for petitioner.

K. P. Govinda Menon and *B. Govinda Nambiar* for respondent.

The Court delivered the following

JUDGMENT :—The case relied on by the Subordinate Judge has been overruled by the Privy Council in *Dakhina Mohan Roy* v. *Saroda Mohan Roy*, I. L. R., 21 C., 142, and the principles applicable to cases like that now before us are laid down. It appears to us that it is common justice that if the plaintiff in good faith made payments of rent and revenue due by the tarwad of the 2nd defendant and thereby saved the land for the benefit of the tarwad on its ultimately establishing its rights thereto, the plaintiff is entitled to be reimbursed that sum by the tarwad. If the plaintiff received

mesne profits, they should, of course, be taken into account, and equally, if he made payments not due or in excess of what were due by the tarwad, he would not be entitled to charge them against the tarwad.

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We must set aside the decree of the Subordinate Judge as against defendants 2 to 11 and order him to restore the suit to his file, and to proceed to dispose of it in accordance with law, taking an account of sums properly paid by the plaintiff for the benefit of the tarwad, and of profits received by the plaintiff from the land. 1st defendant is clearly not liable. His costs in this Court must be paid by the plaintiff. The plaintiff's costs in this Court must be paid by the tarwad.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Subrahmania Aiyar and Mr. Justice Benson.

Meenatchi Ammal ... Appellant * (*6th Defendant*)

v.

Kalyanarama Aiyar ... Respondent (*Plaintiff*).

Hindu law—Partition—Civil Procedure Code, S. 317—Suit for partition by a member of a Hindu family against another who has purchased family property benami for the family.

Meenatchi Ammal v. alyanarama Aiyar.

Section 317 is no bar to a suit by a member of a Hindu family for a division of the family property, brought against the other members and a certified purchaser of family property benami for the family in a sale held in execution of a decree against the family.

Appeal against the decree of the Subordinate Judge's Court of Kumbakonam in O. S. No. 13 of 1894.

This was a suit for partition of family property. Plaintiff was the son by the third wife of one S, and the defendants 1 to 3 and one K were the sons of his second wife. During the lifetime of S, K brought a suit for a division against his father and brothers and got a decree. He executed the decree in part and died. His widow succeeded to his properties including the partially executed decree. She too died subsequently and the defendants with the intention of defrauding the plaintiff who was a minor got all the

* S. A. No. 95 of 1896. 9th March 1897.

Meenatchi Ammal v. Kalyanarama Aiyar.

properties of K's widow transferred to M benami for the family and got also the decree for mesne profits in favour of K executed and had some of the family properties sold and bought by M also benami for the family. The plaintiff now sued his brothers and M for partition of the family property. Among other pleas M contended that his purchases cannot be shown to have been benami for the family. The Sub-Judge found all the sales in favor of M benami for the family, raised an issue whether S. 317, C. P. C., is a bar to the plaintiff's suit and decided it in his favor. His judgment was as follows:—

"Is the plaintiff entitled to a share in the disputed properties I mean, such as were bought in a court auction, or is he barred from claiming it either by S. 317 or S. 244 of the Civil Procedure Code? These are the questions raised in the last two additional issues and they were raised on behalf of the 6th defendant. It seems to me, that so far as the present plaintiff is concerned, neither of these sections applies to shut him out and bar him from recovering his share of the lands. Though he was a party to the decree he was no party to the arrangement by which this sham purchase was made in the 6th defendant's name, and his object is not to set it aside as made in fraud of his rights as a member of the family to whom the purchase-money belonged. The case of *Natesa Aiyar* v. *Venkatramayyan*, I. L. R., 6 M., 135, is on all fours with the facts of this case and it was there held that S. 317 would not operate as a bar."

"The Privy Council case reported in *Bodh Sing Doodhooria* v. *Guneschunder Sen*, 19 W. R., 356, on which the 6th defendant's Vakil relies, was considered and distinguished in the Madras case above quoted, and I cannot find it to apply to the present case."

"In *Monappa* v. *Surappa*, I. L. R., 11 M., 235, the facts were that a purchaser in a court-sale acknowledged he was a *benami* purchaser and gave up possession and after some time ejected the true owner, and when the true owner next sued, he sought to defend his possession by relying on S. 317.

"In such a case too, the Court held, that the section was no bar and we find the facts here established to be that the 6th defendant did not claim any right as purchaser though nominal proceedings were had in her name and she was only given possession not under the process of court but by the 2nd defendant in fraud of plaintiff's rights long after

the sale. She cannot plead that the possession thus given her was had under her rights as courtpurchaser and seek the protection afforded by S. 317 as against the plaintiff."

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"The cases reported in *Kanizak Sukina* v. *Monohur Das*, I. L. R., 12 C., 204, and *Subha Bibi* v. *Hara Lal Das*, I. L. R., 21 C., 519, also support the plaintiff and although the former case was dissented from by their Lordships the Chief Justice and Mr. Justice *Handley*, in *Rama Kurup* v. *Sridevi*, I. L. R., 16 M., 290, it was said that so far as it related to S. 317, it was an *obiter dictum*. Whether it was so or not, their Lordships did not consider the two earlier Madras cases reported in the 6th and 11th volumes and did not dissent from them."

C. R. Pattabhirama Aiyar and *C. Mahadeva Aiyar* for appellant.

V. Krishnaswami Aiyar and *R. A. Krishnaswami Aiyar* for respondent.

The Court delivered the following

JUDGMENT:—The Subordinate Judge has given excellent reasons, founded on clear documentary and oral evidence for his conclusion that the transfers to the 6th defendant were benami for the family of the plaintiff and defendants 1 to 3. These reasons have not been shown to be incorrect in the argument before us. We concur in the finding of the Subordinate Judge on this issue. As to the effect of S. 317 of the Civil Procedure Code, with regard to the plaintiff's right to maintain the present suit to recover his share of the family property, we observe that the present case is governed by the decision in I. L. R., 6 M., 135. That case is exactly on all fours with the present case, and has not been overruled or dissented from in the cases referred to by the appellant's Vakil (*Rama Kurup* v. *Sridevi*, I. L. R., 16 M., 290; *Sankunni Nayar* v. *Narayanan Nambudri*, *Ib.*, 17 M., 282; *Kumbalinga Pillai* v. *Ariyaputra Padiachi*, *Ib.*, 18 M., 436).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Benson.

Muthu Lakshmi Ammal ... ... Appellant.*

v.

Narayana Pattar and others ... Respondents (*Plaintiff's representatives.*)

Muthu Lakshmi Ammal v. Narayana Pattar.

Hindu law—Waste by widow—Reversioners entitled to injunction to restrain widow—Acts imperilling reversioners' interests.

A Hindu widow in possession of her husband's estate exchanged some of the securities forming part of that estate and standing in her name for others in her brother's name. The securities so got by exchange made no reference whatever to the widow's title and by their language seemed to indicate that they belonged solely to the brother. In a suit by her husband's reversioners to restrain her from so exchanging the securities:

Held: that the acts of the widow were such as would imperil the interest of her husband's reversioners, and

that they were entitled to an injunction restraining the widow from exchanging the securities in the way she did.

Hurrydoss Dutt v. *Sreemutty Uppoornah Dossee*, 6 M. I. A., followed.

Appeal against the decree of the Subordinate Judge's Court of South Malabar at Palghat in O. S. No. 24 of 1893.

The facts of the case appear sufficiently from the judgment of the Court.

K. Narayana Rao for appellant.

P. R. Sundara Aiyar for respondents.

The Court delivered the following

JUDGMENT:—It is contended for the appellant that no case has been made out for an injunction inasmuch as no waste has been proved.

It is true that the evidence does not establish that any property has been actually made away with, but the question really is whether the conduct of the widow—the qualified owner—has been such as to lead to a well grounded fear that the interests of

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* A. 194 of 1895. 7th July 1897.

Muthu Lakshmi Ammal v. Narayana Pattar.

the reversioners are being substantially imperilled. *Hurrydoss Dutt* v. *Sreemutty Uppoornah Dossee*, 6. M. I. A., 433.

We agree with the Subordinate Judge that the evidence in this case justifies such a fear. A reference to Exhibits A and B shows that the widow exchanged a security (Exhibit B) standing in her own name for one (Exhibit A) standing in her brother's name, and the latter makes no reference to the widow's title but on the contrary by its language leads to the inference that the property belongs solely to her brother, thus rendering it difficult for the reversioner to prove hereafter that the property formed part of the estate. The sum due under this Exhibit A was admittedly collected by the widow's brother in 1887, and he states that he obtained a receipt for it from the widow, but no such receipt has been produced.

It is said that the money was re-invested by the widow, but the documents said to relate to it are all documents executed either shortly before or actually after the institution of the suit in 1893. No accounts are produced to show that these securities really relate to the sum collected in 1887, and the widow has given no evidence on the point.

The circumstances connected with this transaction thus suggest strongly that an attempt was being made to facilitate the brother's misappropriation of a part of the property, belonging to the estate and support the plaintiff's contention that a similar attempt was being made in regard to the sum of Rs. 5,500 mentioned in the plaint. This sum, like the former sum, was transferred from a security standing in the widow's name to her brother, by means of a *hundi* and it is not alleged that in this *hundi* any reference is made to the fact that the money really belonged to the estate.

We think, therefore, that the Subordinate Judge was justified in granting an injunction aganist the widow. The form of it is, however, partly indefinite. In lieu of it, we direct that the widow be restrained from obtaining securities for the sum mentioned in the plaint otherwise then in her own name. With this slight modification we dismiss the appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Subrahmania Aiyar and Mr. Justice Boddam.

Narasinga Pillai ... ... Petitioner * (*Plaintiff*)

v.

Muthusami Naickar ... ... Respondent (*Defendant*).

Narasinga Pillai v. Muthusami Naickar.

Consideration, extension of time of performance sufficient—Agency revoked—Payment to agent after revocation and without notice, validity of.

A payment by a debtor to the agent of his creditor after the agent's authority had been terminated is valid as against the creditor, provided the debtor had no notice of the termination of the agency when he paid the debt.

N was one of the joint owners of a *shrotriem* village, of which the defendants were tenants. N was also for some time agent of the other *shrotriemdars* to manage the affairs of the village. Subsequently, however, the other *shrotriemdars* withdrew their authority from N, but this fact was not made known to the defendants. The defendants fell into arrears in the payment of rent for a period subsequent to the termination of N's agency and for such arrears they executed debt bonds in the name of N. The plaintiff was the assignee of such bonds. In a suit by the plaintiff on these bonds:

Held, that the bonds were not void for want of consideration and that the defendants were bound to pay the amounts due under the bonds and were protected from a second demand on the part of the other *shrotriemdars* by S. 208 of the Indian Contract Act.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decrees of the District Munsif's Court of Chingleput in Small Cause Suit No. 357 of 1895.

The defendants are the ryots of the *shrotriem* village of Perumaleri, of which one Nizamudeen Saheb and certain others are *shrotriem* owners. The other *shrotriemdars* had executed a power-of-attorney to Nizamudeen to manage the estate for them and in pursuance of this power he was managing the village for himself and for the other *shrotriemdars*. Disputes having subsequently arisen between Nizamudeen and his co-shrotriemdars, the power given to the former was cancelled in 1886. This fact, however, did not come to the knowledge of the defendants, and they went on paying rent as before to Nizamudeen. The rent due from them, however, fell in arrears for the years 1887 to 1889, and

* C. R. P., 828 of 1895. 13th November 1896.

for these arrears they executed bonds in the name of Nizamudeen. Nizamudeen assigned these bonds to the plaintiff and the plaintiff sued on them.

The defence in substance was, that as the rents for which the bonds came to be executed were due to Nizamudeen and his co-owners of the *shrotriem*, and as the power-of-attorney on the strength of which Nizamudeen managed the estate for them had been cancelled, it was not competent for him to have taken these bonds for the rents in his name alone, and that the assignment by him did not give plaintiff a valid and legal title to collect the arrears in disregard of such owners.

The District Munsif dismissed the suit. The plaintiff thereon preferred this revision petition to the High Court.

N. Subrahmanyam for petitioner.

P. R. Sundara Aiyar for counter-petitioner.

The Court delivered the following

JUDGMENT :—We cannot accept the contention that the bond was executed to Nizamudeen as agent alone, for he was entitled to a portion of the rent himself as a co-sharer and a contract with him by the defendant for consideration appearing on the document, *e.g.*, the giving of time for payment is valid and binding even though given at a time when his authority to act as agent for his co-sharers had in fact been determined. No notice of such determination is alleged to have been given to defendant who is protected by S. 208, Contract Act, from any possible claim by the other co-sharers for the rent due to them.

The plaintiff as the assignee of the bond is therefore entitled to recover the amount due.

We must set aside the decree of the District Munsif and decree the amount sued for with costs and interest at six per cent. per annum from the date of the plaint till date of payment. Defendant must pay the costs in this Court also.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Shephard and Mr. Justice Davies.

Narayanasami Mudaliar ... ... Petitioner * (*Plaintiff*)

v.

Lokanibalammal ... ... Respondent (*Defendant*).

Narayanasami Mudaliar *v.* Lokanibalammal.

Contract Act—Act IX of 1872, S. 2—Proposal—Promissory note—Stamp.

A letter requesting the addressee to lend a sum of Rs. 200 to the writer and asking the same to be sent to him through a third person and continuing "I will send these two hundred rupees with interest at Rs. 2-1-4 per cent. per mensem, and have it credited in this letter and get it back" is not a pro-note but a mere proposal for a loan and is consequently admissible in evidence though bearing no stamp.

Dhondbhat Narharbhat v. *Atmaram Moreshvar*, I. L. R., 13 B., 669, followed.

Ayyanna v. *Nagabhooshanam*, I. L. R., 16 M., 283, distinguished.

Petition under S. 25 of Act II of 1887, praying the High Court to revise the decree passed by the Subordinate Judge of Kumbakonam in S. C. No. 78 of 1896.

This was a suit for the recovery of Rs. 225, borrowed by the defendant's deceased husband on the 9th July 1895, under an *olai* letter, dated the same day, asking the plaintiff to send him Rs. 200 through Savooriraja Moodali, and which the plaintiff accordingly sent. The letter ran as follows:—

"As I have to purchase the samba paddy which Pappakudi Savooriraja Mudaliar has settled for me with Venkatachalathudayar in Kakusara Nattam, you will send Rs. 200 through Savocriraja Mudaliar. I will send these two hundred rupees with interest at Rs. 2-1-4 per cent. per mensem, and have it credited in this letter and get it back. Should there be a delay in your sending, the bandy will return in vain. You will have to send without delay. Therefore yours."

The defendant was *ex-parte*, and the Sub-Judge dismissed the plaintiff's suit by the following judgment:—

Defendant is *ex-parte*. Plaintiff proposes to prove the loan by the letter produced. It is an unstamped pro-note containing terms exactly the same as those of a document which the High Court pronounced to be one of that category in *Ayyanna* v. *Nagabhooshanam*, I. L. R., 16 M., 283; so it is not admissible in evidence, not being stamped. It was said

* C. R. P. No. 247 of 1896. 29th January 1897.

there was consideration independent of the pro-note which the plaintiff can prove and the Court's attention is drawn to the statement contained in para. 1 of his plaint. They are nothing more than what generally precedes before a writing is taken as evidence of a contract, and that cannot be proved independently of the pro-note rejected as inadmissible. (See *Pothi Reddi* v. *Velayudasivan*, I. L. R., 10 M., 94). I dismiss the suit.

The plaintiff then preferred this revision petition to the High Court under S. 25 of Act IX of 1887 on the following grounds :—

(1) "The Sub-Judge was wrong in holding the letter inadmissible in evidence."

(2) "The letter being merely a promise to repay money if lent is not a pro-note."

(3) "Even if the letter was inadmissible, the Judge should have other evidence of the debt."

V. Krishnaswami Aiyar for petitioner.

B. Panchapagesa Sastri for counter-petitioner.

The Court delivered the following

JUDGMENT :—There can be no doubt that in the letter the defendant's husband merely asked for a loan of money. The letter does not amount to a promise, and no obligation would have arisen unless the addressee had consented to comply with the request and to lend the money. Acceptance on the defendant's part of the offer made in the letter was necessary before any obligation could be said to arise, whereas if the letter were equivalent to a promissory note, it would follow that on mere proof of the writing and signature the plaintiff would have been entitled to recover. We cannot understand how such a letter can be construed as a promissory note, or how the request of the writer to send the letter back can make any difference. The terms of the letter in *Ayyanna* v. *Nagabhooshanam*, I. L. R., 16 M., 283, are not quite the same as they are in the present case. The case more closely resembles the case of *Dhondbhat Narharbhat* v. *Atmaram Moreshvar*, I. L. R., 13 B., 669. We must reverse the decree. There must be a decree for plaintiff for the amount claimed with interest and costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur Collins, *Kt.*, Chief Justice, and Mr. Justice Benson.

Perumal Ayyan ... ... Appellant* (*Plaintiff*)

v.

Alagirisami Bhagavathar and others ... Respondents (*1st to 6th Defendants*).

Perumal Ayyan v. Alagirisami Bhagavathar.

Limitation—'On demand,' meaning of—Bond payable on the happening of a contingency on demand—Right to sue, accrual of.

A hypothecation bond executed in February 1882, after providing for payment of interest in monthly instalments at the rate of 1 per cent. per mensem, and for the payment of principal in two years contained the following stipulation on the part of the obligors. "If there be default . . . in paying the interest every month, I shall pay in full the principal with interest at 1½ per cent. per month on demand by the holders out of my said hypothecated properties." There was default in the payment of the very first instalment of interest. In a suit instituted in June 1894 by the obligee against the obligor for the realization of the money due under the bond:

Held: that the plaintiff's right to sue accrued on the defendant's failure to pay interest according to the stipulation, that, is in March 1882;

that the expression "on demand" must be regarded as equivalent to "immediately or forthwith;" and

that as the suit was instituted more than 12 years from March 1882 it was barred by the law of limitation.

Hanmantram Sadhuram Pity v. *Arthur Bowles*, I. L. R., 8 B., 561, and *Ball* v. *Stowell*, I. L. R., 2 A., 322, distinguished.

Second appeal against the decree of the District Court of Madura in A. S. No. 829 of 1894, reversing the decree of the Court of the District Munsif of Madura in O. S. No. 307 of 1894.

The facts of the case appear sufficiently from the judgment of the Court.

V. Bhashyam Aiyangar, C. R. Pattabhirama Aiyar, and *S. Gopalasami Aiyangar* for appellants.

P. S. Sivaswami Aiyar and *K. P. Madhava Rao* for *T. Natesa Aiyar* for respondents.

The Court delivered the following

JUDGMENT:—The only question argued before us is that of limitation. The decision on that question depends upon the

* S. A. No. 850 of 1895. 12th November 1896.

construction to be placed on the terms of the bond as to the time when the money became due and payable. The bond runs as follows :— "As I have received Rs. 300 (three hundred) in respect of both "items in accordance with the said particulars, I shall pay you "every month Rs. 3, being the interest on the said amount at 1 per "cent. per mensem and (shall pay) the principal Rs. 300 in two years' "time and receive back this and the three deeds and the former "debt bond. If, in the meantime the hypothecated chits fall to my "lot, I shall receive the sums due thereon, and pay them endorsing "payments herein below. If there be default in making payments "as aforesaid, in subscribing to the said chits, or in paying the "interest every month, I shall pay in full the principal with interest "at 1½ per cent. on demand by the holder out of my said hypothe- "cated properties. I shall pay the commission due for taking the "first collections."

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This bond was executed on the 9th February 1882. If, therefore, the interest had been regularly paid, the principal would not have become due until the 9th February 1884, and the suit having been instituted within twelve years from that date, *viz.*, in June 1894, would not have been barred by limitation. It is, however, admitted that no payment at all was made until October 1885, and the lower appellate Court has found that the payment then made was not made on account of interest, but on the general account and that this payment did not, therefore, give rise to a new *tempus a quo* so as to save the bar by limitation.

The lower appellate Court held that the money became due on the first default in payment of interest, *viz.*, in March 1882, and that, as the suit was not brought within twelve years from that date, it was barred.

It is admitted that there is nothing to show that any demand for payment was made by the plaintiff before the 9th February 1884, and it is argued by the appellant before us that, in the absence of such demand, the money did not become due until the 9th February 1884, and that the suit was, therefore, improperly dismissed as time-barred.

We do not think that this contention can be sustained. It is conceded that, if the bond ran simply "I shall pay the principal

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with interest on demand," no demand would have been necessary to make the money due, and that time would have run from the date of the bond. (*Hempammal* v. *Hanuman*, 2 M. H. C. R., 472; *Rameshwar Mandal* v. *Ram Chand Roy*, I. L. R., 10 C., 1034.)

The fact that there is a previous covenant to pay the money within a certain date does not, we think, alter the meaning or effect of the words in the later clause making the money payable on demand. The words "on demand" must, we think, be regarded as a technical expression equivalent to "immediately" or "forthwith." That, we think, was the intention of the parties. The defendants having failed to pay interest according to the stipulation in the first part of the bond, the money became payable forthwith, and no actual demand was necessary to complete the plaintiff's cause of action.

The appellant's vakil has referred to *Hanmantram Sadhuram* v. *Arthur Bowles*, I. L. R., 8 B., 561; *Ball* v. *Stowell*, I. L. R., 2 A., 322, but neither of them is on all fours with the present case. In the former, the words were "if so required," and the High Court held that there was a deliberate omission by the plaintiff to realize the condition on which the amount should become payable. In other words, it held that the intention of the parties was that the money should not be payable unless and until the plaintiff required the defendant to pay it. In the second case, it was found that the money was to become due only on default in payment of both premia and interest, and there was no proof that there was default in payment of the premia.

In the present case, we are of opinion that the plaintiff's right to sue accrued on first defendant's failure to pay the stipulated interest, that is, in March 1882. The lower appellate Court has found, as a fact, that the payment made by first defendant in October 1885 was not made on account of interest. That is a finding of fact which we cannot question in second appeal. Time, therefore, ran against plaintiff from March 1882, and his suit not having been brought within 12 years from that date was barred by limitation and was rightly dismissed.

We, therefore, confirm the decree of the lower appellate Court and dismiss this second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Benson.

Rajah Kaundan ... ... Appellant * (*Defendant*)

v.

Rangaya Kaundan ... ... Respondent (*Plaintiff*).

Rajah Kaundan *v.* Rangaya Kaundan.

Madras Rent Recovery Act, VIII of 1865, S. 78—Distraint unlawful—Suit for the recovery of specific property illegally distrained—Limitation Act, Sch. ii, Art. 49.

A landlord distrained his tenants' moveable property, under the provisions of the Rent Recovery Act, for the recovery of arrears of rent due to him.

It was found that the landlord had not delivered a pattah to the tenant before he distrained his property as required by law. In a suit by the tenant brought *bona fide* to recover from the landlord the specific moveables unlawfully distrained, or in the alternative for damages, but instituted more than six months from the date of the *distraint*:

(1) *Held*: that the act of the landlord was one professedly done under the Rent Recovery Act, notwithstanding the fact that no pattah had been tendered;

(2) that the suit being one for the recovery of specific moveables, did not fall within the provisions of S. 78 of the Rent Recovery Act and was not therefore barred by reason of that section; and

(3) that the proper rule of limitation to be applied was that contained in Art. 49, Sch. ii, Limitation Act.

Srinivasa v. *Emperumanar*, I. L. R., 2 M., 42, distinguished.

Second appeal against the decree of the District Judge of Salem in A. S. No. 181 of 1894 confirming the decree of the District Munsif of Namakal in O. S. No. 469 of 1893.

The facts of the case appear sufficiently from the judgment of the Court.

S. Subrahmania Aiyar for appellant.

P. R. Sundara Aiyar for respondent.

The Court delivered the following

JUDGMENT:—This was a suit by a tenant to recover specific property alleged to have been wrongfully distrained by his landlord. The plaint prayed for the recovery of the property and of its price, Rs. 100.

* S. A. 14 of 1896. 29th March 1897.

Rajah Kaundan v. Rangaya Kaundan.

The defendant pleaded that the suit was barred by the special limitation prescribed under S. 78 of the Rent Recovery Act (Madras) VIII of 1865, as the suit was brought more than six months after the cause of action had accrued. S. 78 enacts that "nothing in this section shall be construed to debar any person from proceeding in the ordinary tribunals to recover money paid or to obtain damages in respect of anything professedly done under the authority of this Act—provided that civil courts shall not take cognizance of any suit instituted by such parties for any such cause of action, unless such suit shall be instituted within six months from the time at which the cause of action arose." The District Judge held that the distraint was not an act professedly done under the law, but in defiance of it, inasmuch as no pattah had, in fact, been tendered as required by law and he referred to the case reported in *Srinivasa* v. *Emperumanar*, I. L. R., 2 M., 42, in support of his decision. He, therefore, held that the special limitation in S. 78 of Act VIII of 1865 did not apply, but that the case was governed by Art. 49, Sch. ii of the Indian Limitation Act and confirmed the decree of the District Judge awarding the plaintiff Rs. 60 as the value of the property distrained. The defendant appeals.

We are unable to agree with the District Judge that the appellant did not act professedly under the Rent Recovery Act, and in defiance of it. The case reported in I. L. R., 2 M., 242, stands on a different footing from the present case. There the Sub-Collector, finding that the formalities required by the Act had not been observed, removed the attachment and directed the restoration of the property. The cause of action was the refusal to restore the property after such order. That could not in any view be regarded as a thing even professedly done under the Act. It was clearly a wrongful withholding of the property independently of any provisions of the Act. In the present case the distress professed to be made by the landlord under the provisions of the Act. The fact that no pattah had previously been tendered, though it may affect the legality of the distress, does not alter its character as a thing done professedly under the Act.

We, therefore, disagree with the ground on which the District Judge has based his decision. We, however, hold on other grounds that S. 78 is inapplicable. The special limit provided in that

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section must be restricted to the classes of suits specified in the section, *viz.*, to suits (1) to recover money paid, and (2) to obtain damages in respect of anything professedly done under the Act. The present suit was for the recovery of specific moveable property, and, therefore, does not fall within the category under S. 78. We are satisfied that the suit was not brought in this form in order to evade the limitation provided by S. 78. The suit was for a jewel and a brass pot, and there was no allegation on either side that the property had been sold prior to the suit. The mere fact that there was an alternative prayer for the value of the property, does not alter the essential character of the suit as one for recovery of specific moveable property.

As S. 78 is inapplicable, the limitation is that prescribed by Art. 49, Sch. ii of the Indian Limitation Act, and the suit is not barred.

We, therefore, confirm the decrees of the Courts below and dismiss this second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur Collins, *Kt.*, Chief Justice, and Mr. Justice Shephard.

Ramakrishna Aiyar ... ... { Appellant* (*Petitioner, Assignee, Plaintiff*)

v.

Narayana Aiyar ... ... { Respondent (*Counter-Petitioner, Defendant.*)

Civil Procedure Code, Ss. 233, 246—Transferee of decree.

Ramakrishna Aiyar v. Narayana Aiyar.

The assignee of a decree, which subsequent to the assignment is appealed against and confirmed by the appellate Court without his (the assignee's) name being brought on the record, is an assignee within the meaning of S. 246, Civil Procedure Code, and a satisfaction entered on the decree under the provisions of that section is binding on him though made subsequent to the assignment to him and before his name is brought on the record.

Appeal against the Order of the District Court of Tinnevelly passed in A. S. No. 98 of 1895, presented against the order of the Court of the District Munsif of Ambasamudram in execution petition No. 471 of 1894 in the matter of O. S. No. 63 of 1888.

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* A. A. A. O. 41 of 1896. 24th February 1897.

Ramakrishna Aiyar v. Narayana Aiyar.

The facts of the case appear sufficiently from the judgment of the Court.

C. Sankara Nair for appellants.

M. R. Ramakrishna Aiyar for respondents.

The Court delivered the following

JUDGMENT:—The appellant is the assignee of a decree for money made in favour of one Easwara Aiyar against the respondent. The respondent is the holder of a decree for a much larger sum against the same Easwara Aiyar. Subsequently to the assignment to the appellant an order was made to the respondent's application that the amount due to him under his decree should be set off against the amount due by him under the other decree. This order is dated 31st of January 1891. The appellant was no party to it, for at that date his name had not been brought on the record. Notwithstanding this, the appellant claiming as assignee ought to have the decree executed against the respondent. By an order, dated 5th September 1893, his application was dismissed. On the 17th September 1894, the appellant succeeded in having his name brought on the record and he then launched the present application for the execution of his decree.

There can be no doubt that, as between the original parties to the two decrees, that is, Easwara Aiyar and the respondent, this application must necessarily have failed nor would it make any difference that one of the decrees had been assigned to a third party. But it is argued that the appellant is not an assignee of the decree within the meaning of sections 233 and 246 of the Code inasmuch as it is the decree of the appellate Court that it is sought to execute, and his assignment took place before the appeal was instituted. It is said that the sections cited apply only to the case of an assignment of an existing decree, and that in this case the decree was not in existence when the assignment was made. As a matter of fact, it appears that it was the original decree which was assigned to the appellant and was afterwards confirmed on appeal. We are asked to treat the case as if it were one in which an interest in the subject-matter of the suit had been transferred pending the suit, the case for which S. 372 provides.

We are of opinion, however, that, as the appellant was clearly transferee of the decree in existence when the transfer took place, he did not cease to be transferee by reason for the fact that an appeal was presented. Ramakrishna Aiyar v. Narayana Aiyar.

In that appeal Easwara Aiyar remained the party on the record, and it was not shown that the respondent had any notice of the assignment to the plaintiff. The same state of things continued up to the date of the order of the 31st January 1891. We should be prepared to hold that, as the appellant suffered Easwara Aiyar's name alone to remain on the record and proceedings to be taken accordingly, he must be bound by the order passed in consequence. But we also think that the appellant is an assignee of the decree within the meaning of S. 246.

We must dismiss the appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Benson.

Ramasami Kottadiar and others ... Appellants* (*Defendants*)

v.

Murugesa Mudali and others ... Respondents (*Plaintiffs*).

11 & 12 Vic., ch. 21; § 7—Vesting order, effect of discharge of—Attachment during the continuance of vesting order—Validity of attachment—Composition deed, effect of, on attachment. Ramasami Kottadiar v. Murugesa Mudali.

V applied to be declared an insolvent and a vesting order was issued in respect of all his properties on the 11th of January 1888. On the 23rd of January and the 7th of February 1888, R attached the properties in execution of a money decree and got some of them sold. On the 17th of December 1888, the insolvent petition was dismissed and the vesting order discharged. On the same day V executed a composition deed by which he vested all his properties in certain trustees for the discharge of his debts. In a suit by the trustees for a declaration that R's attachment and the sales thereunder were void and not binding on them:

Held, that the attachment and the sales were not void and that the composition deed could not affect the lien created in favor of R by his attachment.

Second appeal against the decree of the Court of the Subordinate Judge at Trichinopoly in A. S. No. 165 of 1892, reversing

* S. A. 1723 of 1895. 8th April 1897.

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the decree of the District Munsif's Court at Trichinopoly in O. S. No. 377 of 1890.

The facts of the case appear sufficiently from the judgment of the Court.

V. Krishnaswami Aiyar for appellants.

T. S. Tyagaraja Aiyar for 1st respondent.

The Court delivered the following

JUDGMENT:—The plaintiffs, as trustees appointed by one Venkatesa Tawker for the payment of his debts, sued to set aside the attachment of Tawker's property made by one of his creditors and also to set aside certain sales made under the attachment. Before the order of attachment was issued, Tawker had applied to the Commissioner of Insolvency, Madras, to be declared an insolvent and a vesting order had been made. Subsequent to the issue of the attachment the insolvency petition was dismissed and the vesting order discharged. The order of attachment was not objected to, nor was it withdrawn before the vesting order was discharged. Some of the properties attached were afterwards sold in pursuance of the attachment and were purchased by the defendants. The rest of the property remained under attachment. The plaintiffs were appointed trustees by an instrument of the same date as the discharge of the vesting order. They contend that the attachment having been made during the continuance of the vesting order, the judgment-debtor had no interest on which the attachment could operate, and that it was, therefore, invalid as against them. We do not think that this argument is sound. The effect of the provisoes to section 7 of the Insolvency Act (11 & 12 Vic., ch. 21) was to revest Tawker's property in him as from the date of the vesting order, subject, however, to all acts done by the assignee, or under his authority, during the continuance of the vesting order.

We think, therefore, that the attachment may properly be held to be capable of operating on Tawker's property as from the date of its first issue; but, in any case, it must be held to have taken effect from the moment of the discharge of the vesting order. That being so, it took effect, in any view, before the plaintiffs

acquired an interest under the trust deed. The decree of the Sub-Judge must, therefore, be set aside and that of the District Munsif dismissing the suit restored. The plaintiffs must pay defendants' costs throughout.

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The suit having been disposed of on the grounds stated above, it is not necessary for us to decide the other question argued before us as to whether section 42 of the Specific Relief Act is a bar to the suit as framed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur Collins, *Kt.,* Chief Justice, and Mr. Justice Benson.

Udayar Pillai ... . Petitioner* (*Defendant*)

v.

Muthia Pillai ... ... Respondent (*Plaintiff.*)

Pro note payable to a specified person—Negotiable Instruments Act, Ss. 13, 48—Endorsement.

Udayar Pillai v. Muthia Pillai

A pro-note not payable to a specified person or his order, or to the order of a specified person is not a negotiable instrument, and there is no objection to a transfer of such an instrument otherwise than by endorsement.

Pattat Ambadi Marar v. *Krishnan*, I. L. R., 11 M., 290; *Abboy Chetti* v. *Ramachandra Rau*, I. L. R., 17 M., 461, distinguished.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif of Dindigul in S. C. No. 1500 of 1895.

The suit was on a pro-note for Rs. 80, payable on demand to one Dharmalinga Pillai and executed on the 5th March 1894. Dharmalinga Pillai transferred the note to the plaintiff for Rs. 89½ by a registered transfer-deed, dated 19th February 1895. The defendant pleaded that the transfer was invalid, as it had not been effected by endorsement. The District Munsif overruled the objection and decreed the plaintiff's suit. The defendant then preferred this revision petition under S. 25 of Act IX of 1887.

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*C. R. P. No. 239 of 1896. 1st December 1896.

ıyar Pillai v. thia Pillai.

T. Natesaiyar for petitioner.

V. Krishnaswami Aiyar for respondent.

The Court delivered the following

JUDGMENT :—The decree of the District Munsif is right for the reason stated by him.

The pro-note is not payable to a specified person or to bearer or to the order of a specified person, and it is, therefore, not a negotiable instrument. There is, therefore, no objection to its transfer otherwise than by endorsement. In both the cases relied on by the petitioner *Pattat Ambadi Marar* v. *Krishnan* (I. L. R., 11 M., 290, and *Abboy Chetti* v. *Ramachandra Rao, Ib.* 17 M., 461), the notes were payable to a specified person or order, which made them negotiable instruments, and, therefore, not transferable except by endorsement.

We dismiss the petition with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Arthur Collins, *Kt.*, Chief Justice, and Mr. Justice Benson.

Durgamma ... ...Appellant * (*Plaintiff.*)

v.

Kadambari Virrazu and others... ... Respondents (1*st*, 2*nd* and 4*th Defendants.*)

Durgamma *v.* Kadambari Virrazu.

Inam lands—Enfranchisement of, karnam maniam—Widow, grant of inam putta to—Nature of grant.

The effect of enfranchising and granting an inam putta to a widow, who is in possession of lands originally held by her husband and his ancestors as *karnam-maniam*, is to make an absolute gift of the lands to the widow which she can enjoy and alienate as full owner.

Narayana v. *Chengalamma*, I. L. R., 10 M., 1, doubted.

Hayagreeva v. *Sami*, 15 M., 286, followed.

Second appeal against the decree of the Subordinate Judge of Cocanada in A. S. No. 196 of 1895, reversing the decree of the District Munsif of Amalapur in O. S. No. 668 of 1893.

The plaintiff as the daughter of one Papayya sued to recover 7 acres 18 cents of inam lands from the possession of the defendants who claimed to hold it under an alienation made by Achamma, the widow of Papayya and mother of the plaintiff. The defendants' case was that the property was karnam mirasi service inam, that it was enfranchised in the widow's name and an inam putta was granted to her with full powers of alienation, and that the suit was therefore unsustainable. The Munsif decreed the plaintiff's suit, and on appeal the Sub-Judge reversed the decree of the Munsif and dismissed the suit. The plaintiff thereupon preferred this second appeal to the High Court.

K. Narayana Rao for appellant.

E. Venkatrama Sarma for respondents.

The Court delivered the following

JUDGMENT :—It is contended for the appellant that the decision of the lower appellate Court is opposed to the ruling in *Narayana* v. *Chengalamma*, I. L. R., 10 M., 1.

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* S. A. No. 1400 of 1896. 1st September 1897.

Durgamma v. Kadambari Virrazu.

It may, perhaps, be that the contention is well founded, but it is not necessary for us to consider the question, as it is clear that the decision is in accordance with the decision of the Full Bench in the case of *Venkata* v. *Rama* (I.L.R., 8 M., 249). This decision of the Full Bench was not referred to in the case on which the appellant now relies, and we are bound to follow the ruling of the Full Bench. Under that ruling the widow must be held to have acquired the land under the *inam* title-deed as her own absolute property by grant from Government. That decision proceeded on the broad ground that the plaintiff did not hold the office of karnam at the time of the enfranchisement, and, therefore, had no title to sue for the lands, and that the land when enfranchised was at the disposal of Government and alienable to whomsoever the Government pleased. It regarded the *inam* title-deed as evidence of a grant of the land personally to the grantee, and that was the view followed in the case on which the Sub-Judge relies. *Hayagreeva Sami* (I.L.R., 15 M., 286.)

Following, then, the principle of the Full Bench case, we are of opinion that there was an absolute grant by Government to the widow and that the appellant cannot question her alienations. There was no reason why Government should grant her only a widow's estate, rather than an absolute estate.

We confirm the decree of the lower appellate Court and dismiss this second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Boddam.

Mirasa Ravuthan ... Appellant * (*Plaintiff*)

v.

Abdul Kani Ravuthan ... Respondent (*2nd Defendant*).

Mirasa Ravuthan v. Abdul Kani Ravuthan.

Advance money, lien for—Contract, rescission of—Purchase with notice of contract.

A person who contracts with another to buy immoveable property and pays a portion of the purchase money in advance is, if he were subsequently to rescind the contract under justifiable circumstances, entitled to have a lien for the money so

* S. A. No. 45 of 1897. 26th August 1897.

Mirasa Ravuthan v. Abdul Kani Ravuthan.

advanced on the property in the hands of his vendor and in the hands of a third person, even though such third person might have purchased it subsequent to the rescission and subsequent to the date fixed by the original contract for the conveyance, provided such third person had notice of the contract at the time of his purchase.

Second appeal against the decree of the Subordinate Judge's Court of Coimbatore in A. S. No. 355 of 1895, confirming the decree of the Court of the District Munsif of Udumalpet in O. S. No. 44 of 1895.

The plaintiff entered into a contract with the 1st defendant on the 19th June 1893 to buy a house, the property of the latter, and paid to him in advance the sum of Rs. 25. The sale was to be completed by 5th September 1893, when the whole of the purchase money was to be paid and the plaintiff was to be put in possession of the house and the title-deeds relating to it. Before the time stipulated for the execution of the sale, the 1st defendant committed some acts which amounted to a breach of the contract and consequently entitled the plaintiff to put an end to the contract. Taking advantage of the acts of the 1st defendant the plaintiff refused to complete the contract. After refusal by the plaintiff and after the 5th September 1893, the date fixed for the completion of the contract, the 2nd defendant purchased the property from the 1st defendant with a full knowledge of all the previous transactions connected with the property. The plaintiff then sued both the defendants for damages sustained by him, owing to the acts of the 1st defendant, for the recovery of the advance made by him and to recover those sums upon the security of the property sold to the 2nd defendant. The Courts below gave a decree for the plaintiff, but held that he could have no lien over the property in the hands of the 2nd defendant. The plaintiff then preferred this second appeal to the High Court.

P. R. Sundara Aiyar for appellant.

C. Mahadeva Aiyar for respondent.

The Court delivered the following

JUDGMENT:—We think that the lower Courts were both wrong in refusing the plaintiff's claim to a lien on the property agreed to be sold by the 1st defendant to the extent of the moneys

Mirasa Ravuthan v. Abdul Kani Ravuthan.

paid by the plaintiff in anticipation of the contract being carried out. We must, therefore, vary the decrees by declaring that the plaintiff is entitled to a lien for Rs. 32 upon the plaint lands as against the 2nd defendant.

Proportionate costs as against 2nd defendant throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Davies.

Musaliyam Kunhi... ... Appellant * (*Defendant*)

v.

Valiyakath Periyattail ... Respondent (*Plaintiff*).

Musaliyam Kunhi v. Valiyakath Periyattail.

Civil Procedure Code (Act XIV of 1882), Ss. 574—Judgment of appellate court—Reasons for decision to be stated.

Where an appellate court sends down an issue to the court of First Instance for a revised finding on it after taking further evidence and the lower court returns the revised finding, the appellate court, is in the absence of any admission by the party against whom the issue has been found, bound to form its own opinion on the evidence and record its finding with reasons for it, even though no objections may have been raised against the finding by the party himself.

But if under such circumstances the appellate court simply accepts the finding without even saying whether it concurs in it or not, then its judgment on it is not a judgment as required by S. 574 of the Civil Procedure Code.

Bhagvan v. *Kesur Kuverji*, I. L. R., 17 B., 428, *Ramchandra Govind* v. *Sono Sadashiv, Ib.*, 19 B., 551, followed.

Second appeal against the decree of the District Court of South Malabar in A. S. No. 612 of 1895, modifying the decree of the Court of the District Munsif at Kutnad in O. S. No. 120 of 1895.

The plaintiff who was the wife of the defendant sued for the recovery of Rs. 133-13-9, of which Rs. 105 is the *mahur* settled between the parties and Rs. 28-13-9 is the *kazi* given at the time of marriage. She alleged that the defendant before paying off the marriage dues divorced her; and hence the suit. The defendant alleged that he had not divorced the plaintiff and that the *mahur* had been satisfied.

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* S. A. 55 of No. 1897. 1st September 1897.

Musaliyam Kunhi v. Valiyakath Periyattail.

The Munsif found the divorce not proved and consequently decreed the plaintiff's suit only with respect to the *mahur* being Rs. 105-0-0. The plaintiff then appealed to the District Court and the District Judge sent back the issue on the question of divorce for a revised finding upon taking some further evidence. Thereupon, the Munsif took some further evidence and returned a revised finding on the issue in favor of the plaintiff, *i.e.*, that there had been a divorce as pleaded by her. The defendant did not file any memo. of objections against that finding. The District Judge then passed the following Judgment:—

"The lower Court now finds on further evidence that its former decision was wrong, and that a divorce as alleged by the plaintiff really took place. The appeal is allowed and the decree of the lower Court modified by directing that plaintiff get a decree as prayed in the plaint with costs throughout."

The defendant, thereon, preferred this second appeal to the High Court on the ground that the District Judge had written no proper judgment.

P. R. Sundara Aiyar for appellant.

K. P. Govinda Menon for respondent.

The Court delivered the following

JUDGMENT:—Albeit there may have been no memo. of objections, it was incumbent on the Judge to examine into the correctness of the finding and come to a conclusion whether he accepted it or not, unless its correctness had been admitted by the parties to whom it was adverse, *viz.*, the defendant in this case. There is nothing to show there was such admission and the Judge has not expressed any opinion on the matter in question. There is, therefore, no judgment as prescribed by the Code. We must, therefore, reverse the decree and remand the appeal to be disposed of according to law; see *Umed Ali* v. *Salima Bibi*, I. L. R., 6 A., 383, 391; *Bhagvan* v. *Kesur Kuverji*, *Ib.*, 17 B., 428, and *Ramchandra Govind Sono Sadashiv*, *Ib.*, 19 B., 551. Costs to abide and follow the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmánia Aiyar and Mr. Justice Benson.

Pokree Sahib Beary ... ... Appellant * *(Plaintiff)*

v.

Pokree Beary ... ... Respondent. *(Defendant).*

Pokree Sahib Beary *v.* Pokree Beary.

Transfer of Property Act, § 72, cl. (*a*) & (*c*)—Mortgagor and mortgagee—Accounts, taking of—Costs of defending mortgagor's title—Costs of suits for the recovery of rent.

In the taking of accounts between mortgagor and mortgagee.

1. A mortgagee in possession is entitled to be given credit to for the costs of any suit (including appeals therefrom) that he might have had to defend in protecting his mortgagor's title.

2. Such a mortgagee is not entitled to add to his principal money the costs of suits that he might have had to institute against tenants brought on the land by himself, for the recovery of rent.

Second appeal against the decree of the District Court of South Canara in A. S. No. 7 of 1894 reversing the decree of the District Munsif's Court of Mangalore in O. S. No. 20 of 1892.

This was a suit by the son of the original mortgagor after her death to redeem the mortgaged property from the hands of the defendant on the ground that the mortgage claim had been satisfied. The defendant admitted the satisfaction of the mortgage so far as the principal money and interest were concerned, but claimed to be entitled to certain costs that he had incurred under the following circumstances:—After taking possession of the property, the mortgagee let in the mortgagor as his tenant, and on his falling into arrears, had to bring a suit against him to recover possession of the property and the arrears. Secondly, the present plaintiff claimed the mortgaged property as his, adversely to his mother who was the original mortgagor, and the mortgagee had to incur expenses in defending that suit and the appeal therefrom. The mortgagee now claimed credit for both the above-mentioned costs that he had to incur. The Courts below allowed the claim of the defendant.

C. R. Pattabhirama Aiyar for appellant.

K. Narayana Rao for respondent.

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* S. A. No. 482 of 1896. 21st July 1897.

Pokree Sahib Beary v. Pokree Beary.

The Court delivered the following

JUDGMENT :—The lower Courts have properly held that Exhibit 3 is not binding upon the plaintiff and that the 1st defendant is not therefore entitled to the sum therein mentioned. The next question is whether the 1st defendant is entitled to all or any of the sums allowed by the District Judge as payable by the plaintiff before he can recover possession of the mortgage property. The sums are claimed as due in respect of costs incurred by the 1st defendant in certain suits (Exhibits V, VI & VII). The sum in Exhibit V represents costs incurred by 1st defendant in a suit for rent due by the original mortgagor as a tenant of the 1st defendant. The tenancy was created subsequent to the mortgage, and the rent was not made a charge on the property by the contract between the parties. Moreover the decree in the suit was only a personal decree. In these circumstances, we are unable to hold that these costs are incurred for the due management of the property and the collection of the rents within the meaning of S. 72 (*a*) of the Transfer of Property Act, 1882. To hold otherwise would in many cases enable the mortgagee to recover from the mortgagor the expenses incurred by the former in attempting to recover rents from tenants put into possession by himself. Should such tenants fail to pay, there is no reason why the mortgagor should be responsible for the expenses of the litigation, unless, of course, he has entered into any contract with the mortgagee to be responsible. The fact that in the present case the mortgagor is the tenant can make no difference in principle, since she was sued as tenant and not as mortgagor. The 1st defendant is not entitled to make those costs a charge on the property. As regards the costs incurred in the other suit to which Exhibits VI and VII relate, we observe that in that suit the mortgagor's title was impeached by the present plaintiffs and the costs were incurred by the 1st defendant—the mortgagee—in defending the mortgagor's title. Such costs are clearly within the rule in S. 72 (*c*) of the Transfer of Property Act. The law to this effect was laid down long ago in *Godfrey* v. *Watson* (3 Atk., 517); and *Parker* v. *Watkins* (Johns. 133) is no exception to the rule. For, all that was there decided was that "if some litigious person chooses to contest his (the mortgagee's) title to the mortgage, that should not affect the parties interested in the equity of redemption." The Vice-Chancellor, moreover, expressly

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observed that "where a mortgagee has been put to expense in defending the title to the estate, the defence being for the benefit of all the parties, he is entitled to charge these expenses against the estate," p. 137. The latter is precisely the present case. The District Judge was, therefore, right in allowing these costs. The District Judge has not given any finding as to the amounts to be allowed with reference to the repairs of the embankment and the trees cut; but the sum is trifling, and the respondent's vakil does not press to have the case sent back for a finding on those matters.

Both parties have to some extent failed to establish their respective contentions. We shall, therefore, allow the 1st defendant only half the costs throughout. The plaintiff must bear his own costs. The decree for redemption will be modified in accordance with these findings and the time for redemption will be three months from this date.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur Collins, *Kt.*, Chief Justice, and Mr. Justice Shephard.

Ponnambala Pillai ... ... Appellant* (*Plaintiff*)

v.

Sundarappayyar ... ... Respondent (*Defendant*).

Ponnambala Pillai v. Sundarappayyar.

Hindu Law—Father's contract to sell, how far binding on after-born son—Antecedent debt—Family necessity.

Where a contract made by a Hindu to sell ancestral immoveable property is enforced, the purchaser under the sale does not take the interest in the property of a son born to the vendor subsequent to the date of the contract and prior to the date of the actual transfer, if the contract was one made for a consideration which is not an antecedent debt, or which is not one required for purposes of the family.

Second appeal against the decree of the District Court of Tanjore in A. S. No. 255 of 1895, confirming the decree of the Court of the District Munsif of Kumbakonam in O. S. No. 422 of 1893.

The facts of the case appear sufficiently from the judgment of the Court.

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* S. A. No. 754 of 1896. 29th July 1897.

The Officiating Advocate-General (V. Bhashyam Aiyangar) and *V. Krishnaswami Aiyar* for appellant.

C. R. Pattabhirama Aiyar for respondent.

The Court delivered the following

JUDGMENT:—The facts of this case lie in a small compass, and there was so little dispute about them that no issues of fact were raised in the Court of First Instance. In 1872, before the birth of the plaintiff, his father, together with his brother, Saminada, having certain debts to pay off, entered into an oral contract with the defendant to sell to him their family lands in the village of Anakkudi and their share of the palace in the same place for the sum of Rs. 29,000. On the 10th May 1872, the vendors wrote to the defendant the letter marked XVIII. In it they say that three velies and odd have not yet been delivered into their possession under the court-decree, and they ask the defendant to let the matter stand over and take a sale-deed in respect of the remaining properties for Rs. 25,000, expressing their willingness to execute a sale "in respect of the said maniams, punjah, &c., lands for a sum of Rs. 3,500 as soon as we get possession of the same." To this request the defendant acceded, and accordingly a conveyance in his favour was executed on the 12th May 1872, comprising the other lands included in the contract and expressed to be in consideration of the sum of Rs. 25,500, details of which are given in the document. The proceedings in the partition suit referred to in the letter XVIII are not before us. But it appears from the exhibits put in by the defendant (XIV and XV) that it was in May 1872, uncertain what share of the punjah lands would fall to the vendors, and that in the result they did not get the lands which they expected to get. This did not happen till February 1877, before which date the plaintiff had been born and his father's brother had died. By that time the plaintiff's father had repented of his bargain, and accordingly he refused to convey to the defendant the punjah lands of which he came into possession. The result of this conduct was a suit for specific performance brought by the present defendant. This litigation went on during 1880 and 1881 and ended in a decree against the plaintiff's father. The plaintiff himself was not joined in this suit, and it is quite impossible to hold, as was argued by the respondent's vakil, that the plaintiff was in any way represented in the suit

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by his father. Now, in this suit instituted soon after the plaintiff came of age, he claims a moiety of the property conveyed to the defendant in pursuance of the decree for specific performance made against his father. The plaintiff's case is that, inasmuch as he was born before the decree was passed or the conveyance executed and the sale of the property was not necessitated by the exigency of any debt pressing on his father, he being by birth a co-parcener with his father, is entitled to repudiate the sale so far as his moiety is concerned. The District Judge appears to have based his judgment in the defendant's favour on the ground that the sale was made under the original contract, and that as the plaintiff was bound by the sale made on the 12th May 1872, so he must be bound by the further sale made in pursuance of the same contract. It has not been found by either Court that there was any necessity for the sale impeached by the plaintiff. The defendant's case must, therefore, be rested on the ground that a contract for sale made by a Hindu before a son is born to him is binding on the son, notwithstanding that the latter is born before the transfer of the property takes place. No authority was cited for this position, and we do not think it can be maintained. The son of a Hindu on his birth becomes a co-parcener with his father in respect of family property. This right of the son may be defeated, or rather is prevented from coming into existence by an alienation of the property made before the son's birth. We are asked now to hold that a mere contract for sale operates as an alienation, and that in the suit which may be brought on that contract by the purchaser the son has no other defence than the father would have. In support of this argument reference is made to the doctrine of equity, according to which the purchaser under a contract for sale is for certain purposes regarded as the owner of the property. If otherwise this doctrine has any application, we do not see now it can avail the defendant and alter the fact that his vendor's interest in the property was liable to be diminished by the birth of a son. It is not as if the son claimed through the father. A purchaser in the position of the defendant before actual transfer of the property is in no worse position than the purchaser of a co-parcener of an undefined share. As the latter takes subject to the chance of the vendor's share being diminished before partition takes place, so a purchaser in the defendant's position,

contracting with one whose interest is liable to diminution, must take subject to that liability. Ponnambala Pillai v. Sundarappayyar.

But the whole argument for the defendant rests on the assumption that the contract enforced by the suit of 1880 was the original contract of 1872. We think this is a complete mistake. On the acceptance of the offer made in the letter already mentioned, a new contract with new incidents was effected with regard to the lands which the plaintiff's father was not then in a position to deliver. In that new contract there was a condition which was not fulfilled until long after the plaintiff's birth. It is impossible, therefore, to hold that at the date of his birth there was no property in eixstence to which the plaintiff's right could attach. On the ground that the property of which partition has now been claimed had not passed from the family when the plaintiff was born, we must hold that the plaintiff is entitled to the decree for which he asks. It is suggested that he ought to be put upon terms, and that it should be assumed that his share of the purchase-money came to his hands. This, however, is a point which ought to have been taken in the Court of First Instance and made the subject of an issue. It cannot be assumed that the plaintiff has become possessed of any part of the purchase-money, and there is admittedly no evidence to support the observation made on the point by the District Judge.

The decree must be reversed and a decree passed in favour of the plaintiff: and the respondent must pay the costs in all the Courts.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur Collins, *Kt.*, Chief Justice, and Mr. Justice Shephard.

Raghu Gowdo ... ... Appellant* (*Defendant*)

v.

Gowdo Chandro Naiko ... ... Respondent (*Plaintiff*).

Inamdars unregistered—Landlord and tenant—Act VIII of 1865 (Madras), §§ 1 and 3 —Registration not conclusive—Relationship of landlord and tenant by attornment. Raghu Gowdo v. Gowdo Chandro Naiko.

* S. A. No. 1014 of 1896. 22nd April 1897.

Raghu Gowdo v. Gowdo Chandro Naiko.

A registered inamdar is not by the mere fact of his name being registered in the revenue accounts, entitled to compel the tenants on the inam to accept puttahs and execute muchilikas under the provisions of the Rent Recovery Act.

Where an inam belongs to a joint Hindu family and is registered in the name of the eldest member of the eldest branch, but the tenants have for sometime attorned to a junior member and have been exchanging puttahs and muchilikas with him, it is not competent for the senior member to interfere with this relationship and compel the tenants under the provision of the Rent Recovery Act to accept puttahs from him as being the sole registered proprietor.

Quære: His remedy is to have his title to tender puttahs declared as against the junior member in a regular suit.

Ayyappa v. *Venkatakrishnamarazu*, I. L. R., 15 M., 484 (distinguished).

Second appeal against the decree of the District Court of Ganjam in A. S. No. 269 of 1894, reversing the decree of the Court of the General Deputy Collector of Gumsur in S. S. No. 8 of 1894 brought to enforce acceptance of puttah under S. 9 of Act VIII of 1865.

The plaintiff sued the defendant in the Court of the Deputy Collector of Gumsur to accept a puttah from him and execute a muchilika. The defendant was a tenant of the inam village Gotchabadi, which formed part of the mitta of Bagadh (Gumsur taluk) and which was entered in the revenue accounts in the name of the plaintiff. The plaintiff's case was that being the registered proprietor, he was the only person entitled to tender puttah, to the defendant. The defendants contended that for over 20 years he had been accepting puttahs from one Jagannadha and that the plaintiff had no right to tender any puttah to him. It was found by the Courts below that the plaintiff and Jagannadha formed members of a joint undivided Hindu family, that the village in question formed part of the estate belonging to the joint family, that the name of the manager of the eldest branch alone was registered in the revenue accounts, that that branch lived for a long time in a village some distance away from the plaint village where the other branches of the family lived, and that in their plaint village the tenants (of whom the defendant was one) have been exchanging puttahs and muchilikas for over 20 years with one Jagannadha who was one of the members of the junior branches and resident in the plaint village. Upon these facts the Deputy

Collector dismissed the plaintiff's suit. On the question whether the plaintiff was entitled to tender puttah to the defendant as his landlord, he said : Raghu Gowdo v. Gowdo Chandro Naiko.

"Plaintiff's pleader relies on *Ayyappa* v. *Venkatakrishnamarazu*, I. L. R., 15 M., 484. In this it has been decided that a registered zemindar alone is entitled to offer a puttah. The registration of zemindars is governed by special regulations while the plaintiff in the present suit is entered in the revenue accounts for the protection of Government revenue as a managing member of a joint family, and I do not consider that the decision quoted would govern the present suit. The mere fact of the plaintiff's name being entered in the revenue accounts cannot, in the face of the evidence on record, in my opinion, create a relationship of landlord with the defendants with whom no such relationship exists prior to his offering a puttah, assuming that puttahs were properly offered."

"Act VIII of 1865 is clearly intended to provide a uniform process for the recovery of rent and to grant speedy remedy to the landlords and tenants. It certainly contemplates the existence of the relationship of landlord and tenant when they seek any relief under the Act. It seems to be the wish of the plaintiff to establish his exclusive right to the village of Gotchabadi and to obtain the sole possession thereof by a comparatively less expensive and easy course of bringing the present suit without launching upon an expensive regular suit. I therefore find the 1st issue against him."

On appeal the District Judge relying on the case in I. L. R., 15 M., 484, reversed the decree of the Deputy Collector.

The defendant then preferred this second appeal.

The Officiating Advocate-General (*V. Bhashyam Aiyangar*) and *C. R. Puttabhirama Aiyar* for appellant.

N. Subrahmanyam for respondent.

The Court delivered the following

JUDGMENT :—We cannot agree with the view taken by the District Judge to the effect that registration is conclusive.

The judgment cited (I. L. R., 15 M., 484) by him does not support that position. It appears from the judgment of the Deputy Collector that the appellant had given muchilikas to, and accepted puttahs from, Jagannadha for prior faslies, and even for this very

Raghu Gowdo v. Gowdo Chandro Naiko.

fasli for which puttah is now demanded. This being so, it being clear that the appellant having attorned to another landlord who is not and could not properly be made a party to this suit, the suit must fail.

Of course, it is open to the plaintiff, if so advised, to bring a regular suit against Jagannadha to declare his title.

We must allow the appeal and restore the judgment of the Deputy Collector with costs in this and in the lower appellate Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Shephard and Mr. Justice Davies.

Ramaswami Pillai ... ... Appellant* *(Plaintiff)*

Audinarayana Pillai and others ... ... Respondents *(Defendants 1 to 3)*.

Ramaswami Pillai v. Audinarayana Pillai.

Transfer of Property Act, § 53—Good faith, meaning of—Transfer in fraud of creditors.

When it is said that a deed was not executed in good faith, what is meant is that it was executed as a mere cloak, the real intention of the parties being that the grantor should retain the benefit for himself.

Where a debtor gave additional security to his mortgagee for a portion of his mortgage debt and it was found that at that time there was a decree pending in execution against him.

Held: that the granting of the additional security was not bad as being in fraud of creditors.

Second appeal against the decree of the District Court of Tinnevelly in A. S. No. 382 of 1894, reversing the decree of the Court of the District Munsif of Srivikuntum in O. S. No. 660 of 1893.

The plaintiff sued on a hypothecation bond, dated 6th December 1886, executed by the 1st defendant to the plaintiff for Rs. 800. The 2nd defendant was a purchaser of some of the hypothecated properties in a court-auction held in execution of the decree in O. S. No. 647 of 1887 against the 1st defendant. He pleaded that the document sued on was invalid, as there was no consideration for

* S. A. No. 1277 of 1896. 23rd August 1897.

Ramaswami Pillai v. Audinarayana Pillai.

it and as it had been executed with intent to defraud creditors. The 3rd defendant was purchaser from the 2nd defendant, and was also a creditor himself. The Munsif framed the issue " Was Exhibit A the document sued on executed for no consideration in order to defeat and defraud 3rd defendant's claim as creditor, or is it a *bona-fide* document for valuable consideration ?" and gave the following finding on it :—

" On the whole evidence, I have no hesitation in finding that nothing had been paid towards Exhibit C before date of Exhibit A, that Exhibit A was executed for proper consideration (namely, rupees 800 of the 1,700 and odd rupees due under Exhibit C on date of Exhibit A) and that though 1st defendant might have had an idea of favoring his relation creditor (plaintiff) over his other creditors by readily giving additional security for part of the debt due to plaintiff, that will not render the document A a *malafide* one or legally invalid."

In the result he gave judgment for the plaintiff. The 2nd and 3rd defendants thereupon preferred an appeal to the District Court. The District Judge found that there was good consideration for the bond, and that the bond was intended to represent a real transaction; but he found that, at the time this bond was given, the 3rd defendant held a decree against the 1st defendant, and that in execution of that decree he had taken a warrant of arrest against him. From this he came to the conclusion that the bond was intended to defeat the claims of the 3rd defendant, and so reversed the decree of the Munsif and dismissed the suit.

The plaintiff then preferred this second appeal to the High Court.

C. Ramachandra Rao Saheb and *M. R. Ramakrishna Aiyar* for appellant.

C. R. Pattabhirama Aiyar and *R. Sivarama Aiyar* for 3rd respondent.

The Court delivered the following

JUDGMENT :—On the facts found by the District Judge we do not think he was justified in the conclusion that the transaction was in fraud of creditors. The Judge finds there was good cause for the mortgage, but considers that the want of good faith brought the case within the purview of S. 53 of the Act. The reference to good faith occurs only in the proviso to the section. It has first to

Ramaswami Pillai v. Andinarayana Pillai.

be seen whether there was intent to defraud creditors within the meaning of the former part of the section. When it is said that a deed is not executed in good faith, what is meant is that it was executed as a mere cloak, the real intention of the parties being that the plaintiff's grantor should retain the benefit to himself. (*Ex-parte Games; in re Bamford,* 12 Ch. D., p. 324).

There is nothing to show that there was want of good faith in that sense in the present case. S. 53 cannot be understood and correctly applied without reference to the English cases on which the section is really founded.

We must reverse the decree of the District Judge and restore that of the District Munsif. Respondent must pay costs in both the appellate Courts.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur Collins, *Kt.,* Chief Justice, and Mr. Justice Shephard.

Sitapati ... ... Appellant * (*5th Defendant*)

v.

Narasimham ... ... Respondent (*Plaintiff*).

Sitapati v. Narasimham.

Enfranchisement.—Karnam service inam lands.

Where karnam maniam lands are enfranchised and an inam putta is granted for them to the person who holds the office, the presumption is that the enfranchisement is for the benefit of the joint family of which that person is a member, unless he (or those who claim under him) can show that at the time of the enfranchisement the office did not belong to the joint family of which he is a member.

Venkatrayadu v. *Venkataramayya,* I. L. R., 15 M., 285, and *Venkata* v. *Rama, Ib.* 8 M., 249, explained.

Second appeal against the decree of the District Court of Godavari in A. S. No. 77 of 1895, confirming the decree of the Court of the District Munsif of Narasapur in O. S. No. 211 of 1894.

Plaintiff sued for a declaration that he is the adopted son of the 1st defendant, and for setting aside a sale of certain lands made by the 1st defendant, his father, to the 5th defendant so far as the

* S. A. No. 222 of 1896. 1st April 1897.

plaintiff's share was concerned and for recovery of such share. The 5th defendant contended that the lands were karnam service maniam, and that they were enfranchised in 1st defendant's name, and that they were consequently his self-acquisition which he could alienate without infringing any right of the plaintiff. The Munsif held that the lands were not the self-acquisition of the 1st defendant and decreed the plaintiff's suit. On appeal the District Judge following *Venkatarayadu* v. *Venkataramayya*, I. L. R., 15 M., 285; held that the lands by the enfranchisement became the self-acquisition of the 1st defendant, but he confirmed the decree of the District Munsif on the ground that the plaintiff had been adopted on the understanding that 1st defendant was not to alienate his properties, ancestral or self-acquired, and that the alienations of the plaint lands in violation of that agreement was invalid. The 5th defendant, the alienee, preferred this second appeal to the High Court.

Sitapati v. Narasimham.

R. Ranga Rao for *R. Sriramulu Sastri* for appellant.

T. V. Seshagiri Aiyar for respondent.

The Court made the following

ORDER:—The decided case to which the District Judge refers is said to be the case reported in I. L. R., 15 M., 285. According to the respondent's contention the office of *karnam* belonged to the family of which plaintiff and 1st defendant are members, and it is found that the enfranchisement took place when 1st defendant was actual holder of the office. If these are the real facts, we do not think the case of *Venkatarayadu* v. *Venkataramayya*, I. L. R., 15 M., applies, for the judgment shows that there was no intention to go beyond the decision in *Venkata* v. *Rama*, I. L. R., 8 M., 249, and the facts in the latter case are clearly distinguishable from those in the present. There is no sufficient finding by either Court of the fact. We must, therefore, ask the District Judge to return a finding on the issue:—Whether the family of the parties were the holders of the office of *karnam* up to the date of the enfranchisement of the lands. The finding is to be returned within a month after the re-opening of the Court, and seven days will be allowed for filing objections after the finding has been posted up in this Court.

Sitapati v. Narasimham.

[The finding having been submitted, the Court dismissed the second appeal with costs, stating that no additional evidence was given.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Arthur Collins, *Kt.*, Chief Justice, and Mr. Justice Benson.

Thevanna Chetti ... ... Appellant * (*1st Defendant*)

v.

Ramachandra Rao and others ... Respondents (*Plaintiffs*).

Thevanna Chetti v. Ramachandra Rao.

Company—Voluntary liquidation—Assets of Company, sale of, by liquidator—Purchaser of assets—Transfer of Property Act, S. 135—Assets, not actionable claim.

Where a banking association goes into liquidation and the liquidator sells its effects, the purchaser of such effects is entitled to realize the full amount under any bond which may form a part of such effects ; S. 135 of the Tranfers of Property Act has no application to such sales.

Second appeal against the decree of the District Court of Coimbatore in A. S. No. 276 of 1895 confirming the decree of the District Munsif of Erode in O. S. No. 352 of 1894.

The facts necessary for the purpose of this report are clearly set forth in the judgment of the District Judge which ran as follows:—

"This is a suit by plaintiffs who purchased the outstandings of a Banking Association in Coimbatore. This suit is upon a bond which defendants gave to that Bank. The District Munsif gave plaintiffs a decree, and against that decision the 1st defendant appeals.

Upon the evidence on record I concur with the District Munsif in finding that interest was paid and that the suit is not barred.

The only point which presents any difficulty is the plea that plaintiffs under S. 135 of the Transfer of Property Act can recover only what they paid for this actionable claim. In answer to this plea, it is said that the outstandings were sold by the liquidator which is an operation of law, that it is impossible to separate the price paid for this item, and that this question has already been decided by Mr. L. A. Campbell,

* S. A. No. 1543 of 1896. 30th August 1897.

District Judge and by Mr. Clarke, Sub-Judge. To this it is rejoined that the liquidation was voluntary. Thevanna Chetti v. Ramachandra Rao.

I am of opinion that, as the point has been decided in favour of plaintiffs by a District Judge and by a Sub-Judge in an appeal, I may leave first defendant to take the point before the High Court. The appeal is dismissed with costs."

The defendant then preferred this second appeal to the High Court.

P. R. Sundara Aiyar and *V. C. Seshachariar* for appellant.

S. Kasturi Ranga Aiyangar for respondents.

The Court delivered the following

JUDGMENT :—S. 135 of the Transfer of Property Act was never intended to apply to cases like this; and the appellant cannot in any case ask for the benefit of the section unless he can show that in its terms he "paid the buyer the price" paid by him. This he has not done.

We dismiss the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Benson.

Venkata Narasimha Nayudu ... ... Appellant * (*Plaintiff*).

v.

Kotayya ... ... Respondent (*Defendant*).

Occupancy right, presumption as to—Zamindars and ryots, relative interests of, in land—Tenancy from year to year—Transfer of Property Act, Ss. 105, 106. Venkata Narasimha Nayadu v. Kotayya.

According to what may be termed the Indian Common Law, the relations existing between zamindar in a zamindari village (or the Government or other person standing in the position of the zamindar in a Government village), and the ryot in actual occupation of the land comprised in such village, is not that of landlord and tenant as understood in English Law, or that of lessee and lessor under the Transfer of Property Act, though the latter (the ryot) may be liable to pay an annual assessment to the former. *Primâ facie*, a zamindar and his ryot are holders of the *melvaram* and *kudivaram* rights in the land, respectively. Consequently, in a suit by a zamindar to

* S. A. No. 766 of 1896. 10th August 1897.

Venkata Narasimha Nayudu v. Kotayya.

eject a ryot in occupation, there is no presumption that the latter is a tenant from year to year. Before such a presumption can be raised in his favor, the zamindar must show that the *kudivaram* right vested in him or his predecessors at some time or other and that it afterwards passed to the defendant or some person through whom he claims. In the absence of such proof and in the absence of proof of any specified contract or of special or local usage to the contrary, a ryot in zamindari tracts is entitled to occupy his lands so long as he pays what is due, and if he should commit any default in this or other respect, until he is evicted by the processes provided by law.

Second appeal against the decree of the District Court of Godavari in A. S. No. 253 of 1895, modifying the decree of the Court of the District Munsif of Ellore in O. S. No. 100 of 1892.

The facts of the case appear sufficiently from the judgment of the Court.

C. R. Pattabhirama Aiyar for appellant.

C. Ramachandra Rao Saheb for respondent.

The Court delivered the following

JUDGMENT:—In this case the plaintiff, the holder of a permanently settled estate, seeks, among other things, to eject the defendant from certain lands. Admittedly, the lands are situated within the plaintiff's estate and are subject to an annual assessment payable by the defendant to the plaintiff.

The decision of the case depends solely upon these facts, no other facts having been satisfactorily established by the evidence.

In this state of the case the lower appellate Court dismissed the suit in so far as the prayer for possession was concerned. On behalf of the plaintiff it was contended that the dismissal was erroneous and that the error was caused by the lower appellate Court having wrongly thrown the *onus* of proof on the plaintiff. The argument in support of the contention was that upon the admitted facts, the finding must be that the defendant was a tenant from year to year; and as due notice to quit had been given, the tenancy had been determined before the date of the action and the defendant ought to have been ejected.

S. 106 of the Transfer of Property Act, to which reference was made on behalf of the plaintiff, does not apply to the case. If, however, there was a similarity between the relation of the landlord

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and tenant in England and that subsisting here between the plaintiff and the defendant, the English rule embodied in that section, that a general occupation is an occupation from year to year would go far to support the contention for the plaintiff. But there is a very material difference between the relation of landlord and tenant in England and that of a zamindar and a ryot or cultivating proprietor, or, to speak more accurately, the person in whom, with reference to Government or its assignees, the right to occupy the soil for purposes of cultivation is to be taken as vested.

Now a tenant, of course, derives his right from the landlord; and in the case of a person thus acquiring his title, the rule referred to is unquestionably a most equitable rule. For the theory as to the relation of landlord and tenant in England led to the view that, in the absence of proof to the contrary, every tenancy was to be taken to be a tenancy at will. In fact such was the rule until the Judges altered it and laid down that general tenancies should be presumed to be, not tenancies at will, but tenancies from year to year; as was explained in *Doe* v. *Porter*, where Lord Kenyon pointed out that a tenancy from year to year succeeded to the old tenancy at will, which was attended with many inconveniences, and, in order to obviate them, the Court very early raised an implied contract for a year and added that a tenant could not be removed at the end of the year, unless he had received six months previous notice (3 T. R. 13., see also *Doe d Martin* v. *Watts*, 7 T. R. 85). But sound and reasonable as this rule would be if applied to cases in which the right of a defendant in possession is derived in a manner similar to that of a tenant in England, it cannot on principle be extended to cases in which the defendant's right is not so derived. Now, there is absolutely no ground for laying down that the rights of ryots in zamindaries invariably or even generally had their origin in express or implied grants made by the zamindar. The view that in the large majority of instances it originated otherwise is the one most in accord with the history of agricultural land-holding in this country. For in the first place, sovereigns, ancient or modern, did not here set up more than a right to a share of the produce raised by ryots in lands cultivated by them, however much that share varied at different times. And, in the language of the Board of Revenue, which, long after the permanent settlement regulations were passed, investigated and reported upon the

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nature of the rights of ryots in various parts of the Presidency, "whether rendered in service, in money or in kind and whether paid to Rajas, Jagirdars, Zamindars, Poligars, Mittadars, Shrotriemdars, Inamdars or to Government officers, such as Tahsildars, Amuldars, Amins or Thannadars, the payments which have always been made are universally deemed the due of Government." (See the Proceedings of the Board of Revenue, dated 5th January 1818, quoted in the note at p. 223 of Dewan Bahadur Srinivasa Raghava Ayyangar's Progress in the Madras Presidency.) See also paragraphs 75 to 78 of the exhaustive observations of the Board as to the relative rights of Zamindars and ryots in the Board's Proceedings of the 2nd December 1864, appended to the second report of the Select Committee on the Rent Recovery Bill, 1864, V., Madras Revenue register at p. 153). Therefore to treat such a payment by cultivators to zamindars as "rent" in the strict sense of the term and to imply therefrom the relation of landlord and tenant so as to let in the presumption of law that a tenancy in general is one from year to year would be to introduce a mischievous fiction destructive of the rights of great numbers of the cultivating classes in this province, who have held possession of their lands for generations and generations. In support of the view that there is no substantial analogy between an English tenant and an Indian ryot, it is enough to cite the high authority of Sir Thomas Munro. Writing in 1824, he observes "the ryot is certainly not like the landlord of England, but neither is he like the English tenant." (Arbuthnot's Munro, Vol. I, p. 234.) And why is this so? It is for the simple reason that the rights of ryots came into existence mostly not under any letting by the Government of the day or its assignees, the zamindars, etc., but independently of them. According to the best native authorities such rights were generally acquired by cultivators entering upon land, improving it, and making it productive. As observed by *Turner*, C. J., and *Muthusami Aiyar*, J., in *Sivasubramanya* v. *Secretary of State for India*, "Manu and other Hindu writers have rested private property in occupation as owner" (I.L.R., 9 M. at p. 306). And in *Secretary of State* v. *Vira Rayan*, the same learned Judges pointed out "according to what may be termed the Hindu common law, a right to the possession of land is acquired by the first person who makes a beneficial use of the soil" (*Ib.* at p. 179). Hence the well known division in these parts of

the great interests in land under the two main heads of the *melvaram* interest and the *kudivaram* interest. Hence also the view that the holder of the kudivaram right, far from being a tenant of the holder of the *melvaram* right, is a co-owner with him. Sir T. Munro puts this very clearly. He says "a ryot divides with Government all the rights of the land. Whatever is not reserved by Government belongs to him. He is not a tenant at will, or for a term of years. He is not removable because another offers more" (Arbuthnot's Munro, Vol. I, p. 234, See also *Ib.* p. 253). No doubt the view of the majority of the Judges (*Morgan*, C. J., and *Holloway*, J., *Innes*, J., dissenting in *Fakir Muhammad v. Tirumala Chariar* (I. L. R., M., 205) was different. But in *The Secretary of State for India* v. *Nunja*, *Turner*, C., J. and *Muthusami Aiyar*, J., stated that they saw strong reason to doubt whether the view of the majority in that case was right (I. L. R., 5 M., 163 at p. 165).

It thus seems unquestionable that *primâ facie* a zamindar and a ryot are holders of the *melvaram* and *kudivaram* right respectively. When, therefore, the former sues to eject the latter it is difficult to see why the defendant in such a case should be treated otherwise than defendants in possession are generally treated, by being called upon in the first instance to prove that they have a right to continue in possession. One can see no other reason for making such a difference than that certain legislative enactments, especially those passed at the beginning of the century, refer to ryots as tenants and to the payments made by them as rents. But considering that those enactments were intended for particular purposes and considering that Reg. IV of 1822, expressly declares that the actual rights of any of the land-holding classes were not intended to be affected by the earlier regulations, the phraseology of those enactments should not be taken to operate to the prejudice of persons between whom and zamindars the *primâ facie* relation is only that between the holder of the *kudivaram* right and the holder of the *melvaram* right in a given piece of land as shown above. Consequently it is obvious that in a suit like the present the zamindar should start the case by evidence of his title to eject. In other words he has to prove that the *kudivaram* right in the disputed land had been vested in him or his predecessors and taht the land subsequently passed to the defendant or some person through whom he claims under circumstances which give the

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plaintiff a right to eject. This is clear from *Srinivasa Chetty* v. *Nanjunda Chetty*, I. L. R., 4 M., 174. See also *Appa Rau* v. *Subbanna*, I. L. R., 13 M., 60, and *Venkatacharlu* v. *Kandappa*, I. L. R., 15 M., 95. In the first mentioned case *Muthusami Aiyar* and *Tarrant*, J. J., said "But Viraman's (the then defendant's) tenancy has been found to be that of an ordinary pattadar, and we apprehend that such a tenancy, where there is no evidence of a contract as to its origin and duration, or that the *kudivaram* right vested in the Mittadar, (the then plaintiff) at any time, entitles the tenant to the right of occupancy for the purpose of cultivation determinable on the conditions prescribed by (Madras) Act VIII of 1865," I. L. R., 4 M. at p. 176. The contention that the ryot was merely a tenant from year to year was distinctly raised in the above case but was virtually, if not expressly, overruled. We must likewise decline to accept the similar contention urged here on behalf of the plaintiff. It may, perhaps, be asked what is the nature of the holding of persons in the position of the defendant in the lands they hold if they are not tenants from year to year. There can be no hesitation in replying to this question, that in essence there is no difference between a ryot holding lands in a zamindari village and one holding lands in a Government village (Arbuthnot's Munro, Vol. I., p. 254) and like the latter ryot, the former ryot, in the absence of proof of contract or of special or local usage to the contrary is entitled to occupy his lands so long as he pays what is due and if he should commit any default in this or other respect, until he is evicted by the processes provided by law.

The decree of the lower appellate Court is right; the second appeal fails and is dismissed with costs.

The memorandum of objections is also dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Shephard and Mr. Justice Davies.

Venkatramayya and others ... ... Appellants * (*Defendants*)

v.

Kristnayya ... ... Respondent (*Plaintiff*).

Venkatramayya *v.* Kristnayya.

Civil Procedure Code, §§ 54, cl. (*b*), 582 (A)—Court Fees Act, VII of 1870, §§ 6 and 28—Limitation Act, XV of 1877, § 4—Plaint insufficiently stamped—Presentation and filing—Power of Court to grant time.

Under cl. (*b*) of § 54 of the Code of Civil Procedure, a Court in returning a plaint to be properly stamped has no power to fix such a period for payment of deficient fee as would run beyond the last day allowed by the law of limitation for the institution of the suit.

A plaint was presented upon an insufficiently stamped paper on the last day allowed by the law of limitation, and subsequently within the time fixed by the Court was re-presented with a proper stamp. But on the day on which it was represented the suit was barred.

Held: that the suit was instituted only when the proper court fee was affixed, and that as at that moment time had run, the suit was barred.

Jainti Prasad v. *Bachu Sing*, I. L. R., 15 A., 65, followed.

Stuart Skinner v. *William Orde*, *Ib.* 2 A., 247, distinguished.

Second appeal against the decree of the District Court of Kistna in A. S. No. 279 of 1894, reversing the decree of the Court of the District Munsif of Gudivada in O. S. No. 114 of 1893.

The facts of this case appear sufficiently from the judgment of the Court.

P. K. Subrahmania Aiyar for *R. Sriramulu Sastri* for appellants.

E. Venkatarama Sarma for respondent.

The Court delivered the following

JUDGMENT:—The question is whether the plaint having been presented with an insufficient court stamp on the last day allowed by the law of limitation, *viz.*, 29th March 1893 and subsequently within the time fixed by the Court presented again with a proper stamp, can be said to have been duly presented within the time

(Ed. Note, *vide* contra., *Chennappa* v. *Raghunatha*, I. L. R., 15 M., 29; *Moti Sahu* v. *Chhatri Das*, *Ib.* 19 C., 780.)

* S. A. No. 1360 of 1896. 25th August 1897.

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limited by the Act of limitation. According to the 4th section of that Act a suit is instituted when the plaint is presented to the proper officer, and, unless the suit is so instituted within the period prescribed by the schedule, it must be dismissed. This suit, therefore, ought to have been dismissed, if, in point of law, there was no plaint presented on the 29th March 1893. The document presented as a plaint satisfied the requirements of the Civil Procedure Code, but it did not satisfy the requirements of the Court Fees Act, inasmuch as the stamp affixed was 12 annas, when it ought to have been Rs. 15-12-0. This being the case, it was a document which, in view of the provisions of S. 6 of the Court Fees Act, could not lawfully have been filed by the court to which it was presented. Moreover, it was a document which, according to the 28th section of the same Act, possessed no validity. The Act not only imposes a restriction or disability on the court with reference to an inadequately-stamped document. It also by declaring the invalidity of such document makes the proper stamping of a document purporting to be a plaint an essential condition for the existence of a valid plaint. In other words, a plaint inadequately stamped is, in point of law, no plaint at all. I can find nothing in S. 54 of the Civil Procedure Code to conflict with this view of the law. We are not concerned with the case of improper valuation, the case contemplated in clause (*a*) of S. 54 of the Civil Procedure Code and sections 9 and 10 of the Court Fees Act. Nor are we concerned with the case of mistake or inadvertence on the part of the court—the case for which the proviso to S. 28 of the latter Act is applicable. The case before us is the one provided for in clause (*b*) of S. 54 of the Civil Procedure Code. The object of that clause is to give the party who has presented a defectively-stamped plaint an opportunity of supplying the defect. Instead of rejecting the plaint, the Court must fix a time for the supply of the requisite stamp paper. But for this saving provision, a fresh plaint would have been indispensable, as it is if the requisite stamp paper is not supplied within the time fixed. It appears to me that this provision of the law is in no manner inconsistent with the construction which I place upon the Court Fees Act. Because the law makes that provision in favour of the party whose plaint is defective in the matter of stamp, I cannot see why it should be said that the law empowers the court to enlarge the period allowed by the Limita-

tion Act, or gives retrospective validity to a document which, at the time when it was first presented, was invalid. Seeing that the Legislature had before them the proviso to the 28th section of the Court Fees Act which declares in favour of retrospective validity in the case therein provided for, it is not to be supposed that in framing S. 54 of the Code, they intended that principle to be extended to cases not within the proviso. A still stronger argument of a similar character is furnished by S. 582A of the Civil Procedure Code. That section which became law on the 29th July 1892 refers, like the second paragraph of S. 5 of the Limitation Act, to appeals and applications for review of judgment. The section provides for the case of an insufficiency of stamp "caused by mistake on the part of the appellant as to the amount of the requisite stamp." It declares that, notwithstanding the insufficiency, the memorandum of appeal "shall have the same effect and be as valid as if it had been properly stamped." This section probably owes its origin to the decision of the Full Bench in *Balkaran Rai* v. *Gobind Nath Tiwari*, I. L. R., 12 A., 129. It was there held that the practice of giving an appellant time to supply a deficiency of court-fee stamp and treating the memorandum of appeal as validly presented on the day when it was presented with the defective stamp, was erroneous. This practice was one which generally prevailed in this and other courts, and the effect of the new section was to legalize it subject to the condition that the deficiency of stamp was due to mistake on the appellant's part. In the absence of any such mistake, it is clear now that in the case of appeals the decision of the Allahabad Court must prevail. The appeal must be rejected, unless the memorandum adequately stamped is presented within due time. Since the Legislature has by this new section extended a limited indulgence to appellants, it cannot be supposed that it was intended to give plaintiff in respect of their plaints the same indulgence in unqualified terms. To hold in favour of the plaintiff in the present case would mean that, whereas an appellant can take advantage of S. 582-A only on proving mistake, a plaintiff may deliberately and with his eyes open affix an inadequate court-fee stamp and, on the balance being furnished within a time fixed, demand to have his plaint treated as if at institution it had been properly stamped. This cannot possibly have been the intention of the Legislature, for

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the section already mentioned and the latter part of S. 5 of the Limitation Act show that appellants, not plaintiffs, are regarded as parties in whose favour the rigour of the law of limitation should be relaxed.

The case of *Stuart Skinner* v. *William Orde*, I. L. R., 2 A., 247, is relied upon in this as in other cases as containing a dictum of the Judicial Committee in favour of the view advocated by the respondent's vakil. *Skinner* v. *Orde* is, however, easily distinguishable from the present case. There the petition as originally presented by the plaintiff was complete and valid, and only required the order of the Court under S. 308 of the Code then in force to make it fully efficacious as a plaint. After the filing of the petition, the plaintiff acquired the means requisite for paying the court-fee, and accordingly the proper stamp was affixed. The question was whether the plaintiff was, as regards the date of the presenting of his plaint to be placed on the footing on which he could have been, had the order above mentioned been made, or whether the plaint, should have been rejected altogether. There was no question in that case of validating a plaint which was in its inception invalid. In the present case on the contrary that is precisely the contention which must be raised, and it clearly is not admissible, because a transaction *ab initio* void cannot be validated.

I have already given reasons for holding that the plaint as presented was of no legal force or effect whatever. I agree with the decision in *Jainti Prasad* v. *Bachu Singh*, I. L. R., 15 A., 65. I reverse the decree of the District Judge and restore that of the District Munsif with costs.

Davies, J.:—I entirely concur.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur Collins, *Kt.*, Chief Justice, and Mr. Justice Shephard.

Bapu Ammal and others ... . Appellants * (*Plaintiffs*)

v.

Govinda Padiyachi and others ... Respondents (*Defendants*).

Bapu Ammal *v.* Govinda Padiyachi.

Limitation Act, S. 14—Proceeding in wrong court—Time during which, pending.

Where a suit is instituted in a wrong court, which directs the return of the plaint to be represented to the proper tribunal, the proceedings in the 1st court continue, within the meaning of S. 14 of the Limitation Act, until that court is really prepared to deliver out the plaint.

Second appeal against the decree of the District Court of Tanjore in A. S. No. 615 of 1894 confirming the decree of the Subordinate Judge's Court of Kumbhakonam in O. S. No. 28 of 1894.

This suit was originally instituted in the Court of the District Munsif of Kumbhakonam on the 17th October 1893, the last day of the 12 years' limitation. The District Munsif made an order on 8th May of 1894, the last day before the annual recess, directing the plaint to be returned for presentation to the proper Court, as the value of the suit was beyond the Munsif's jurisdiction. Plaintiff alleged that the plaint was detained in the Munsif's Court for taxation of costs till 19th May 1897, and that he could not get it back earlier. The very day it was returned to plaintiff, the present suit was instituted in the Sub-Court. The Courts below without deciding whether it was due to the defendant or the plaintiff or to the act of the Court that the plaint was not returned till the 19th May, held that, even if the delay was due to the act of the Court, the plaintiff was not entitled to deduct the time from the 8th to the 19th May 1897 in computing the period of 12 years prescribed for his suit and dismissed it as barred by limitation. The plaintiff then preferred this second appeal to the High Court.

H. G. Wedderburn for *E. Norton* for appellants.

C. Sankara Nair and *T. Rangachariar* for 1st and 3rd appellants.

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* S. A. No. 1206 of 1895. 15th January 1897.

Bapu Ammal v. Govinda Padiyachi.

The Advocate-General (*J. H. Spring Branson*), *C. R. Pattabhirama Aiyar* and *S. Tyagaraja Aiyar* for 9th respondent.

V. Masilamani Pillai for 8th respondent.

The Court made the following

ORDER :—It appears to us that the real question has not been decided by the District Judge, namely, whether the delay in actually returning the plaint was due to the negligence of the plaintiff or to the act of the Court. If the District Munsif retained the plaint, notwithstanding the application made by the plaintiffs or their pleader, we are of opinion that he ought not to have dated his order on the 8th of May, but on the day on which he was really prepared to deliver out the plaint. Until this date, we think the proceedings would not be ended within the meaning of S. 14 of the Limitation Act; for, according to S. 57 of the Civil Procedure Code, the plaintiffs are clearly entitled to have their plaint returned to them with the final order upon it.

It is stated in the affidavit that the plaintiffs, by their pleader and in person, applied on the 8th May for the return of the plaint and that it was refused. There ought to have been an affidavit by the pleader himself on this point. An opportunity must be given to the pleader to make this affidavit.

The question which the District Judge must decide is whether it was due to the default of the plaintiffs or to the act of the Court that the plaint was not returned till the 19th May.

The finding is to be returned within one month from the date of the receipt of this order, and seven days will be allowed for filing objections after the finding has been posted up in this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Benson.

Kamalammal ... ... Appellant* (*1st Plaintiff*)

v.

Peeru Meera Levvai Rowthan ... Respondent (*Defendant*).

Kamalammal *v.* Peeru Meera Levvai Rowthan.

Debt, interest on—Indian Contract Act, S. 73, *Ill.* (*n*)—Interest Act, XXXII of 1839—Illustration binding—Maxim *generalia specialibus non derogant.*

In the absence of an agreement or usage to the contrary, where a sum of money is due under a contract, the promisee is not entitled either to interest or damages by way of interest, on the sum due, except in cases which fall under Act XXXII of 1839.

Indian Contract Act, S. 73, *Ill.* (*n*) considered.

An illustration to a section has not the force of law and does not form part of the section which constitutes the enactment.

Nanak Ram v. *Mahin Lal,* I. L. R., 1 A., 495; *Koylosh Chunder Ghose* v. *Sonatan Chung Barooie,* I. L. R., 7 C., 132, referred to.

A subsequent general statute is not to be so construed as to repeal the provisions of a previous particular enactment unless there are express words to indicate that such was the intention or unless such intention appears by necessary implication.

Second appeal against the decree of the Court of the Subordinate Judge of Madura (West) in A. S. No. 284 of 1895, reversing the decree of the Court of the District Munsif of Tirumangalam in O. S. No. 415 of 1894.

This was a suit to recover Rs. 1,478-8-0, being the amount of a lease with interest. The first plaintiff is the Zemindarini of Bodinaikanur, and second plaintiff is a mortgagee under her. On the 30th June 1890, the leases of certain fishery hemp and hill produce for fasli 1300 were sold by public auction and the defendant became the purchaser of it for Rs. 1,095. He enjoyed the leases, but did not pay the rent. The suit, which gave rise to this appeal, was brought by the plaintiffs for the recovery of rent, together with Rs. 383-4-0 as interest. It was alleged in the plaint that the defendant was bound to pay the rent on the 30th June 1891, and in default, to pay interest on it at 12 per cent. The suit was brought within

* S. A. No. 267 of 1896. 28th April 1897.

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three years from that date. The defendant, while admitting the leases, pleaded that they were put up for sale on the 20th June 1890, and not on the 30th, and he paid the deposit which was not given credit to in the plaint, that the claim was barred by limitation, and that he was not liable to pay interest. The District Munsif decreed for the entire claim of the plaintiffs, giving them interest on the lease amount by way of damages. The defendant appealed and among other pleas contended that there was no contract to pay interest and that the District Munsif was wrong in giving it by way of damages. The District Judge disallowed the interest claimed. The plaintiff then preferred this second appeal.

T. Rangachariar for appellant.

N. Subrahmanyam for respondent.

The Court delivered the following

JUDGMENTS :—*Subrahmania Aiyar, J.*—The question in this case is whether the plaintiff, to whom a sum of money was payable under an oral contract, is entitled to interest prior to the date of the suit ?

No agreement or usage, giving a right to the interest, was alleged. And it was admitted that no written demand, giving notice that interest would be claimed, was sent under Act XXXII of 1839.

In these circumstances, it must be held that the interest cannot be decreed.

It will be seen from the judgments delivered in the Court of Appeal and in the House of Lords on *London Chatham and Dover Railway Company* v. *South Eastern Railway Company* (1892, 1 Ch. 120, and 1893, App. C. 429) that in England at Common Law, interest was not recoverable as damages in cases similar to the present. That the law of this country must be taken to be substantially the same was established by the decision of the Judicial Committee in *Jagga Mohun* v. *Kaisen Chand*, 9 M. I. A., 256, and in *Kissara Rukkumana Row* v. *Sripathi Vinaya Dikshatalu*, 1 M. H. C.R., 369, *Scotland*, C. J., and *Holloway*, J., laid down broadly that in the absence of a demand in writing, interest up to date of suit cannot be awarded upon sums which are not payable under a written

instrument and of which payment has been illegally delayed. The learned Judges arrived at that conclusion in spite of the practice which they admitted has for a long series of years prevailed in the mofussil courts of awarding interest upon all demands improperly withheld—a practice which, the learned Judges felt bound to declare, was unsupported by authority.

It was, however, contended for the plaintiff that the law on the point has been otherwise since the passing of the Contract Act, and S. 73 of the Act coupled with illustration *n* annexed thereto was relied on. No doubt the section applies to and includes the cases of breach of contract to pay money. But to construe the section as giving a right to interest even in those cases in which it could not be awarded according to the provisions of Act XXXII of 1839, would be to hold that the latter enactment was virtually repealed by the former. Now this is totally opposed to the maxim *generalia specialibus non derogant.* Referring to this, *Bovill,* C. J., observed in *Queen* v. *Champneys*: "it is a fundamental rule in the construction of statutes that a subsequent statute in general terms is not to be construed to repeal a previous particular statute unless there are express words to indicate that such was the intention, or unless such an intention appears by necessary implication, L. R. 6 C. P. at 394-5. The reason for the presumption against a repeal by implication in these cases as stated by Wood, V. C., is, "in passing a special Act the Legislature had their attention directed to the special case which the Act was meant to meet and considered and provided for all the circumstances of that special case; and having done so, they are not to be considered by a general enactment passed subsequently and making no mention of any such intention to have intended to derogate from that which by their own special Act they had thus carefully supervised and regulated. *Fitzgerald* v. *Champneys*, 2 J. and H. at 54 and 55. In the present case, Act XXXII of 1839 is not one of the enactments specified in the schedule to the Contract Act as repealed, and they are no express words in S. 73 indicating an intention to rescind the earlier Act. In fact, there is no real conflict between the two, since effect may well be given to S. 73 by holding that the award of interest as compensation, contemplated by that section, has reference to cases in which such

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award can be made without infringing the provisions of the other Act. Still less can that Act be held to be in any way affected by the illustration relied on; inasmuch as an illustration has not the same operation as the sections which really form the enactment. *Nanak Ram* v. *Mehin Lal*, I. L. R., 1 A. at 495, and *Koylash Chunder Ghose* v. *Sonatan Chung Barooie*, I. L. R., 7 C., 132. Even were it otherwise, it is obvious that the framers of the illustration were not considering under what conditions and limitations interest should be awardable in cases of breach of contract to pay money. They meant only to point out that if in consequence of a breach of that kind a man finds himself unable to pay his debts and is ruined, he cannot recover compensation for loss of that remote character: and the allusion to interest was made to show that that was the only legally recoverable compensation for the breach.

The appeal therefore fails and is dismissed with costs.

Benson, J.—I concur.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Subrahmania Aiyar and Mr. Justice Benson.

Kesavan and others. Appellants * (*Defendants* 18 to 25)

v.

Sankaran Nambudri and others. Respondents (*Plffs.* 1 to 13 and 14*th*, 16*th and* 17*th Defts.*)

Kesavan v. Sankaran Nambudri.

Transfer of Property Act, S. 85—Mortgage suit—Second appeal, dismissal of, for non-compliance with S. 85.

Section 85 of the Transfer of Property Act is imperative, and the provisions contained in it must be strictly conformed to even in appeals and second appeals. A second appeal from a mortgage suit, in which all the persons interested in the mortgaged property are not made parties, is liable to be dismissed for not conforming to the provisions of S. 85 of the Transfer of Property Act, even though all the interested persons had been joined in the court of First Instance.

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* S. A. No. 1423 of 1895. 10th February 1897.

Second appeal against the decree of the Subordinate Judge's Court of Palghat, in A. S. No. 648 of 1893, confirming the decree of the Court of the District Munsif of Betutnad in O. S. No. 245 of 1893. Kesavan v. Sankaran Nambudri.

The plaintiffs sued to redeem the plaint property from the possession of defendants 1 to 13 on the allegation that the property was theirs, and had been mortgaged to the defendants by their Karnavans, defendants 16 and 17. The defendants 1 to 13 admitted the mortgage, but pleaded that it had come to an end or was not subsisting (for reasons not necessary to be stated here), and alleged that they were holding the property under a mortgage from the 14th, 15th and 18th to 25th defendants' tarwad. These latter claimed the property adversely to the plaintiffs. The first Court decreed the plaintiffs' suit. Then defendants 18 to 25 appealed to the lower appellate Court, where, however, they did not join defendants 1 to 13 as respondents. The lower appellate Court confirmed the decree of the first Court. The defendants 18 to 25 thereon preferred this second appeal. Defendants 1 to 13 were not made parties even to the second appeal.

C. Krishnan and *C. Sankara Nair* for appellants.

P. R. Sundara Aiyar for 1st to 13th respondents.

The Court delivered the following

JUDGMENT:—The mortgagees were not made parties to the appeal either in this Court or in the lower appellate Court, though S. 85 of the Transfer of Property Act expressly requires that they should be made parties. The appellants' vakil applies that they may now be made parties and explains that he was not able to make them parties to this second appeal, as they had not been made parties in the lower appellate Court. He is, however, unable to give any satisfactory reason for the omission in that Court.

In these circumstances, we think, we are bound to follow the ruling of this Court in second appeals 51 of 1892 and 1476 of 1889, and dismiss the second appeal with costs on the ground that the appellants have not complied with the requirements of S. 85 of the Transfer of Property Act.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Shephard and Mr. Justice Subrahmania Aiyar.

Manuel S. Lobo ... ... Appellant * (*Defendant*)

v.

Nicholos Britto ... ... Respondent (*Plaintiff*).

Manuel S. Lobo v. Nicholos Britto.

Benami purchase by Government servant—Departmental rule, contravention of—Declaration.

The acquisition of property by a Government servant in the name of another in direct contravention of departmental rules, is not illegal; such Government servant if he is in possession of the property so acquired is entitled to maintain a suit for declaration of his title as against the person in whose name it was acquired, and if not in possession, is entitled to maintain a suit for possession.

Appeal against the decree of the Subordinate Judge's Court of South Canara in O. S. No. 33 of 1895.

This was a suit for declaration that the lands in the plaintiff's possession, but the title-deeds of which stand in the defendant's name, is plaintiff's property. The case for the plaintiff was that he was a Government servant, and from time to time remitted his savings to the defendant, his relative, for the purpose of augmentation and that the defendant purchased the plaint land with that money for his (plaintiff's) benefit. Among other objections, which were all decided against the defendant, he contended that, as the property was purchased in contravention of departmental rules, and with the object of screening it from the notice of the authorities, the plaintiff was not entitled to maintain the suit. The Court below overruled this contention and decreed the plaintiff's suit. The defendant then preferred this appeal.

C. Sankara Nair for appellant.

V. Bhashyam Aiyangar and *K. N. Aiya* for respondent.

The Court delivered the following

JUDGMENT:—It is contended that because the plaintiff acquired the property in the defendant's name for the purpose of concealing it from Government, he being an official of Government

* A. No. 134 of 1896. 9th September 1897.

who was not authorized to acquire by law, the plaintiff cannot recover possession of it from the defendant or obtain any relief in respect of it. We are unable to accept this view. No doubt the plaintiff intended to conceal the acquisition of the land from the authorities and acted dishonestly and in contravention of the rules of his department. But we do not think he can be said to have acted illegally so as to bring the case within the principle that a man is precluded from obtaining relief in respect of a transaction, the purpose of which was illegal and has been accomplished. Manuel S. Lobo *v.* Nicholas Britto.

As to the question whether a declaratory suit lay, we are of opinion that the Judge is right. The defendant never asserted that he was in possession, and the finding is that he was not.

We dismiss the appeal without costs, as also the memorandum of objections.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur Collins, *Kt.*, Chief Justice, and Mr. Justice Shephard.

Maran and another ... ... Appellants* (*1st & 2nd Defendants*)

v.

Ramanna Goundan and another ... Respondents (*Plaintiff & 3rd Defendant*)).

Mortgagor and Mortgagee—Payment to one of several mortgagees—Discharge of debt —Extinguishment of mortgage by payment of debt—Indian Contract Act, Ss. 38, 43, 44 and 45. Maran *v.* Ramanna Gaundan.

A payment made to one of two persons jointly entitled under a mortgage bond can be pleaded as a valid discharge of the debt in an action brought by the other person interested in the bond.

Wallace v. *Kelsall*, 7 M. & W., 264, followed.

Hemendro v. *Rajendro*, I. L. R., 3 C., 353, referred to.

Steeds v. *Steeds*, 22 Q. B. D., 540, dissented from.

The rights under a mortgage instrument are extinguished by payment of the debt. The law entitles a mortgagor to a registered receipt for his mortgage money, but does not exclude other evidence of payment, or make the giving of the receipt a condition precedent to the discharge of the property.

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*S. A. No. 1010 of 1896. 10th August 1897.

Maran v. Ramanna Goundan.

Second appeal against the decree of the Subordinate Judge's Court of Coimbatore in A. S. No. 95 of 1895, reversing the decree of the Court of the District Munsif of Erode in O. S. No. 431 of 1894.

The facts of the case appear sufficiently from the judgment of the Court.

C. Mahadeva Aiyar for appellants.

S. Kasturi Ranga Aiyangar for 1st respondent.

The Court delivered the following

JUDGMENT:—The question raised by this appeal is whether a payment made to one of two persons jointly entitled under a mortgage bond can be pleaded as a valid discharge of the debt in an action brought by the other person interested in the bond. It is found that the party who received payment was not the agent in that behalf of the plaintiff. On the other hand, it is not suggested that there was any fraud on the part of the defendants who made the payment. The appellant's vakil in support of his contention that the payment to one joint creditor was a valid discharge of the debt as against the other, referred to S. 38 of the Contract Act and to the English case of *Wallace* v. *Kelsall*, 7 M. & W., 264. "An offer to one of several joint promisees has the same legal consequences as an offer to all of them." That is the language of the last paragraph of the section.

In the first part of the section, it is provided that where an offer of performance has been made and not accepted, the promisor is not responsible for non-performance. It follows that when a legal tender has been made to one of two joint promisees and refused by him, the promisor is discharged from liability in respect of his promise. It would be difficult to reconcile with this proposition the view adopted by the Subordinate Judge, *viz.*, that the defendants were not discharged by the payment made to the party jointly entitled with the plaintiff. But it is argued on the respondent's behalf that S. 45 of the Act, by declaring the right of the several joint promisees to performance, makes it incumbent on the debtor to satisfy them also before obtaining a complete discharge. It is also suggested that the fact of the creditor being a mortgagee makes a material difference. With regard to S. 45, we cannot see

that the declaration that several joint promisees are entitled to performance is otherwise than consistent with English law, or that, unless it be construed as converting the joint rights under a contract into several rights, it conflicts with the last paragraph of S. 38. To put that construction, the section would amount to saying, that where a contract is made in favor of more than one person they must be taken to be severally entitled under it, for they cannot be jointly and severally entitled. (Bull & Leake, p. 471).

There is no reason whatever to suppose that this was intended by the legislature. A somewhat similar contention was raised in *Hemendro* v. *Rajendro,* I. L. R., 3 C., 353, with reference to S. 43 of the Act as affecting the obligation of persons liable for a debt. The point there decided on the authority of *King* v. *Hoare* (13 M. and W.) was that a decree against one joint debtor was a bar to an action afterwards brought against the others. The Court refused to accede to the contention that, since the passing of the Contract Act, the rule in *King* v. *Hoare* had become inapplicable, because the effect of S. 43 was to enable a promisee to sue one or two of his joint promisors severally in two or more suits. Taking together sections 42, 43, and 45, we find that the Legislature has declared against the common law rule of survivorship as well in the case of joint creditors as in that of joint debtors. Further, in S. 44, the Act has abolished the rule of English Law according to which the release of one joint debtor operates to release his co-debtors. For the proposition that the Legislature intended to go beyond this and refuse recognition altogether to rights or liabilities in *solidum,* we do not think that there is any foundation. We think that effect must be given to the plain language used in S. 38 and that the question above stated must be answered in the affirmative. So construed, the section is consistent with S. 165, which lays down the rule that a bailee who has taken goods from several joint owners may deliver them back to one without the consent of all. It is also consistent with the common law case of *Wallace* v. *Kelsall,* and does not, as far as we can ascertain, conflict with any other case except one which might have been cited in support of the respondents and which we think it well to mention, lest it should be supposed that it has been overlooked. We refer to *Steeds* v. *Steeds,* 22 Q. B. D., 540, the material facts of which are similar to those in *Wallace* v. *Kelsall.* In both the cases

Maran v. Ramanna Goundan.

one of the joint creditors who joined in the action has been satisfied by payment or otherwise. In *Wallace* v. *Kelsall* the plea was held good on demurrer. In *Steeds* v. *Steeds* the statement of defence was held to be good only as regards the plaintiff who had been satisfied his share of the debt. The cases cited in the judgment in *Steeds* v. *Steeds*, do not, in our opinion, altogether support the conclusion arrived at. They go to show that, in equity, persons lending money to a third person are deemed tenants in common, and not joint tenants both of the debt and of any security held for it. Some of the cases refer to the presumption in favour of tenancy in common as against the rule of survivorship while (*Watson* v. *Dennis*, 4 De. 9 J. S. R. 345) which is also cited is to the effect that a purchaser of property comprised in a mortgage would not be compelled to accept the title when it appears that the receipt for the money paid to discharge the mortgage was signed by one only of the mortgagees. *Lord Justice Knight Bruce* in holding that the estate was not fully discharged by such a receipt carefully avoids expressing an opinion as to the question which might arise in an action for the mortgage money. In the present case it may be that a purchaser of the mortgaged property might rightly have refused to complete on the ground that the plaintiff, one of the mortgagees, was not ready to give a receipt or acknowledgment for the mortgage money. But when the question arises in an action to recover the debt, we cannot see that it makes any difference that the debt was secured by a mortgage. If the debt has been satisfied by payment, the rights under the mortgage instrument are extinguished and the action must fail. The law entitles a mortgagor to a registered reciept for his mortgage money, but does not exclude other evidence of payment or make the giving of the receipt a condition precedent to the discharge of the property. In our opinion the mortgage amount was discharged by payment made to the plaintiff's mortgagee, and therefore the suit should have been dismissed.

The decree of the lower appellate Court is set aside and that of the District Munsif restored with costs in this and the lower appellate Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur Collins, *Kt.*, Chief Justice, and Mr. Justice Benson.

The Muncipal Council of Tanjore ... Appellant * (*Defendant*)

v.

Visvanatha Row ... ... Respondent (*Plaintiff*).

The Municipal Council of Tanjore *v.* Visvanatha Row.

District Muncipalities Act, IV of 1884 (Madras), Ss. 211, 212—Drains, repair of, covering over—"New building", meaning of.

The plaintiff, a resident within the local limits of a mofussil municipal town, repaired and rebuilt a masonry covering over a municipal drain in front of his house without the sanction of the Muncipal Council. The Municipal Council removed the covering. The plaintiff then sued the Council for damages.

Held: that the act of the plaintiff did not fall within the last clause of S. 211 of the District Municipalities Act, IV of 1884 (Madras), inasmuch as the act of interference contemplated by that clause must be *ejusdem generis* with the acts mentioned in the previous clauses of the section and the plaintiff's act was not of such a character;

that the structure constructed by the plaintiff was not a new building within the meaning of S. 212 of the same Act and that the plaintiff was consequently entitled to damages.

Second appeal against the decree of the District Court of Tanjore in A. S. No. 198 of 1896, confirming the decree of the Court of the District Munsif of Tanjore in O. S. No. 249 of 1895.

The plaintiff, a resident within the local limits of the Municipality of Tanjore, rebuilt a masonry covering over a drain in front of his house without the sanction of the Municipal Council. The Council objected to its erection on sanitary grounds and had it removed. The plaintiff now sued the Council for damages for this, their wrongful act. The Courts below decreed the suit and the defendant then preferred this second appeal.

V. Krishnaswami Aiyar for appellant.

C. R. Pattabhirama Aiyar for respondent.

The Court delivered the following

JUDGMENT:—The fact that S. 212 of the Act refers only to new buildings and not to repairs is highly significant and clearly

* S. A. No. 1638 of 1896. 14th September 1897.

The Municipal Council of Tanjore v. Visvanatha Row.

indicates that a distinction was intended to be drawn between the two classes of cases. In the present case there was no erection of any new building over the drain. There was only a repair of the existing covering which had been there for the past forty years.

We do not think that such repair can be said to be interference with the drain within the meaning of S. 211. The interference referred to in that section is, as the District Judge remarks, interference similar in character to the kinds of interference specifically referred to in the earlier part of the section.

We, therefore, conclude that the decision of the Court below is correct, and we dismiss this second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Davies and Mr. Justice Boddam.

Nanjappa Goundan ... ... Appellant * (*Plaintiff*)

v.

Nanjappa Goundan and another ... Respondents (*Defendants* 4 to 7).

Nanjappa Goundan v. Nanjappa Goundan.

Civil Procedure Code, S. 13—*Res judicata*—Directly and substantially in issue.

Where, in a suit, two issues are raised, the finding on either of which alone would be sufficient to dispose of the case, but the court finds on both the issues and disposes of the suit, and there is nothing to show on which of the findings the decision is based, the finding on either of the issues is *res judicata* in a subsequent suit with respect to the same matter.

Second appeal against the decree of the District Court of Coimbatore in A. S. No. 63 of 1894, reversing the decree of the Court of the District Munsif of Coimbatore in O. S. No. 576 of 1892.

The plaintiff, a reversioner, sued a widow (in O. S. No. 346 of 1896) for a declaration that an alienation by her of certain lands was invalid beyond her lifetime. Two issues were raised—one as to whether the suit was barred under Art. 125 of Sch. II of Act XV of 1877, the other as to the validity of the alienation. Both points were decided against the plaintiff and his suit dismissed, without

* S. A. No. 1588 of 1895. 23rd February 1897.

mentioning on which of the two points decided, the judgment was based. The present suit was brought by the reversioner against the alienee, after the death of the widow for the recovery of the lands conveyed to him. The Munsif held that the decision in the former suit as to the validity of the alienation by the widow was not *res judicata* and decreed the plaintiff's suit on the merits. The District Judge on appeal reversed the decision and dismissed the plaintiff's suit holding that the question was *res judicata.* The plaintiff thereon preferred this second appeal to the High Court. Nanjappa Goundan v. Nanjappa Goundan.

S. Kasturi Ranga Aiyangar for appellant.

T. V. Seshagiri Aiyar for respondents.

The Court delivered the following

JUDGMENT :—We consider the question as to whether the alienations by the widow were binding on the reversioner was necessary for the decision of the previous suit—quite as necessary as the question of limitation, and we accordingly consider that the decision on that question being between the same parties as in this suit, and being a decision equally binding on them all, operates to make that decision *res judicata.*

We accordingly dismiss the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Subrahmania Aiyar and Mr. Justice Davies.

Natesan Chetti and others ... Appellants * (*Defendants* 2 to 4)

v.

Soundararajayyangar and another ... Respondent (1st *Plaintiff* and 1st *Defendant*).

Indian Limitation Act, XV of 1877, Sch, II, Art. 111 and 132—Lien of vendor for purchase money, unpaid—charge of unpaid vendor—Transfer of Property Act. S. 55, (4) (*b*). Natesan Chetti v. Soundararajayyangar.

A suit by a vendor of immoveable property for recovery of unpaid purchase-money, by enforcement of the charge against the property sold to which he is entitled under S. 55 (4) (*b*) of the Transfer of Property Act, is governed by Art. 111 of Sch. ii of the Limitation Act, and not by Art. 132.

Virchand Lalchand v. *Kumaji*, I. L. R., 18 B. p. 48, dissented from.

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* S. A. No. 1333 of 1896. 2nd September 1897.

Natesan Chetti v. Soundararajayyangar.

Second appeal against the decree of the District Court of Tanjore in A. S. No. 499 of 1895, reversing the decree of the District Munsif of Tiruvadi in O. S. No. 82 of 1895.

The 1st plaintiff sold some lands to the 1st defendant in 1887, part of the consideration for the sale being the payment of a debt due by the plaintiff to one of his creditors. The creditor was not paid the money within a reasonable time and he sued the plaintiff in 1894 and got a decree for the debt due to him. The plaintiff now sued to recover the decree amount from the 1st defendant and from defendants 2 to 4 who had purchased the lands from the 1st defendant with notice of the above mentioned arrangement and its breach. The plaintiff sought to recover the money by enforcement of the charge given him by law against the lands in the possession of the defendants, as well as by proceeding personally against the 1st defendant. The suit was brought in 1895. The District Munsif held that the enforcement of the charge was barred by the law of limitation under Art. 111 of the Limitation Act, but gave a decree for the sum claimed against the 1st defendant alone, as in his (Munsif's) opinion, the cause of action against 1st defendant was the breach of the contract to pay off the creditor and as damage resulted from such breach only in 1894 when the creditor got a decree against the plaintiff. The plaintiff then preferred an appeal to the District Court against defendants 2 to 4; and the District Judge held following *Virchand Lalchand* v. *Kumaji*, I. L. R., 18 B., 48, that the Article applicable to the case was Art. 132, Sch. ii, Limitation Act, and that, consequently, the suit being within 12 years from the date of the contract for sale in 1887, was not barred. The defendants preferred this second appeal to the High Court.

C. R. Pattabhirama Aiyar for appellants.

V. Krishnaswami Aiyar for 1st respondent.

The Court delivered the following

JUDGMENT:—This is a suit to enforce the lien possessed by a vendor of immoveable property in respect of unpaid purchase money. The Court of First Instance decided that the case fell within Art. 111 of the Limitation Act. But the lower appellate Court following *Virchand Lalchand* v. *Kumaji*, I. L. R., 18 B., 48, held that Art. 132 applied.

Now Art. 111 refers solely and in unmistakable terms to suits such as the present, while Art. 132 deals with suits for money charged upon immoveable property generally. In the case cited above, no reasons were stated as to why the learned Judges arrived at the conclusion that Art. 111 was inapplicable to cases similar to this; and that conclusion is opposed to the well established canon rule of interpretation that, as a rule, general provisions do not derogate from special provisions, but that the latter do derogate from the former. *Generalia Specialibus non derogant; Specialia derogant generalibus.* It is scarcely necessary to observe that if Art. 111 does not apply to such suits as the present, it is impossible to see to what suits it would apply. With all deference to the very learned Judges who decided the case which the lower appellate Court followed, we must hold that the class of suits to which the present belongs, falls under the special provision, viz., Art. 111, and that class is excluded from the comparatively general Art. 132, applicable to cases of money charged on immoveable property not specially provided for in the Act.

Natesan Chetti v. Soundararajayyangar.

In this view, the suit, having been brought after the expiry of 3 years from the date mentioned in col. 3 of Art. 111, was clearly barred. We, therefore, allow the appeal and reverse the decree of the lower appellate Court and restore that of the District Munsif. The respondents must pay the appellants' costs in this and the lower appellate Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur Collins, *Kt.*, Chief Justice, and Mr. Justice Shephard.

Parasurama Pattar ... ... Appellant * (*Plaintiff*)

v.

Veeraraghava Pattar and others ... Respondents (*Defendants*).

Civil Procedure Code, S. 295—Rateable distribution—Refund of assets, suit for, declaration not allowed.

Parasurama Pattar v. Veeraraghava Pattar.

The right to claim a refund of assets given by the last para. of S. 295, Civil Procedure Code, arises only after such assets have been actually paid to a person not entitled to receive the same.

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* A. No. 53 of 1896. 13th July 1897.

Parasurama Pattar *v.* Veeraraghava Pattar.

A suit by a decree-holder for a declaration that another decree-holder is not entitled to a rateable distribution of the assets realized by sale of the judgment-debtor's property at his (plaintiff's) instance, is not maintainable.

Hart v. *Tara Prasanna Mukherjee*, I. L. R., 11 C., 718, followed.

Appeal against the decree of the Subordinate Judge's Court of Coimbatore in O. S. No. 25 of 1894.

The plaintiff got a decree for money in O. S., No. 11 of 1886 against one M, and in execution of that decree got M's property sold and took the assets realized by the sale in discharge of his decree-debt. Pending the application for sale, the defendants who were also decree-holders of M applied for execution and rateable distribution under S. 295, Civil Procedure Code. The Court below dismissed that application for reasons not necessary to be stated here. Thereupon the defendants put in a petition to the High Court to revise that order, and the High Court reversed the order and directed the Court below to proceed with the application. The plaintiff then objected to the sustainability of the application on the ground that under the last para. of S. 295, the proper course for the defendants was to bring a separate suit for rateable distribution. The lower Court accepted that objection and again rejected the defendants' application. The matter again came up to the High Court and was again reversed and remanded for a proper trial. The Court below then ordered the present plaintiff to deposit into Court money that he had received from it for the purpose of distributing it rateably. The plaintiff thereupon brought the present suit for declaration that the defendants were not entitled to a rateable distribution inasmuch as there was no application of theirs for execution pending at the time of the realization of the assets, by reason of the fact that at that time their application had been dismissed by the lower Court. The Court below did not uphold the plaintiff's contention and dismissed the suit. The plaintiff then preferred this appeal to the High Court.

E. Norton and *C. Sankara Nair* for appellants.

P. R. Sundara Aiyar and *K. R. Subrahmania Sastri* for respondents.

The Court delivered the following

JUDGMENT:—On the ground that the assets have not come to the defendants' hands and therefore a refund is not possible, we

must hold having regard to the language of S. 295 of the Civil Procedure Code, that the suit is not maintainable. See *Hart* v. *Tara Prasanna Mukherji*, I. L. R., 11 C., 718.

Parsurama Pattar v. Veeraraghava Pattar.

We must dismiss this appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Davies.

Sethurayer ... ... Appellant * (*Plaintiff*)

v.

Shunmugam Pillai and another ... Respondents (1*st* and 2*nd Defendants*).

Sethurayer v. Shunmugam Pillai.

Civil Procedure Code, S. 232—Benami decree-holder—Real owner entitled to declaration—Suit on bond by benamidar—Agent, decree in the name of, principal entitled to benefit of—Specific Relief Act, S. 56, *cl.* (*b*).

Where a benamidar sues on a bond and gets a decree in his own name, the real owner of the bond can sue for a declaration that he is entitled to the benefit of the decree and execute the same. Similarly a principal is entitled to sue for a declaration in respect of a decree obtained by his agent in his own name. But he cannot sue for an injunction restraining the decree-holder from excuting his decree and realizing the amount due under it.

After getting such a declaration, the real owner has a right to apply under S. 232 of the Civil Procedure Code to have his name put on the record and execute the decree.

Second appeal against the decree of the District Court of Tinnevelly in A. S. No. 161 of 1895, reversing the decree of the District Munsif of Ambasamudram in O. S. No. 213 of 1894.

This was a suit for a declaration that the plaintiff is entitled to the benefit of a decree standing in the name of the 1st defendant and that he is entitled to execute the same, and for an injunction directing the 2nd defendant not to pay the decree amount to the 1st defendant and the 1st defendant from recovering the same from the 2nd. In O. S. No. 152 of 1892, the 1st defendant had obtained a decree against the 2nd defendant on a bond executed

* S. A. No. 1393 of 1896. 24th August 1897.

Sethurayer v. Shunmugam Pillai.

to him by the latter. The plaintiff now alleged that that bond was taken in the name of the 1st defendant benami for himself and that the 1st defendant had, therefore, no right either to the amount of the bond or to execute the decree. The District Munsif decreed the plaintiff's claim, and the District Judge on appeal reversed the decree and dismissed the suit. The plaintiff then preferred this second appeal.

C. R. Pattabhirama Aiyar and *R. Sivarama Aiyar* for appellant.

V. Krishnaswami Aiyar for 1st respondent.

The Court delivered the following

JUDGMENT:—Upon the allegations of the plaintiff, his case may be considered on the footing either that the 1st defendant was his agent, or that he was his benamidar. If 1st defendant was an agent, the plaintiff is entitled to obtain the advantage gained by the 1st defendant in securing a decree upon the bond. Whether 1st defendant's action in obtaining the decree was rightful or wrongful is immaterial. This has long been established law (*Taylor* v. *Plumer*, 3 M. and S. 562).

If 1st defendant was a benamidar, the result would be the same, for he would be in the position of a trustee (Ss. 91 and 95 of the Indian Trusts Act, 1882).

The only remaining question is as to the relief to be given. The injunction prayed for cannot be granted under S. 56, clause (*b*), of the Specific Relief Act, but if the plaintiff's case be true he is entitled to the declaration granted by the Munsif subject to the plaintiff reimbursing the 1st defendant the costs incurred by him in obtaining the decree.

It was contended that such declaration would be fruitless and should not be granted; but we do not agree in this view. Such a declaration being binding on the parties would entitle the plaintiff to apply for the execution of the decree under S. 232 of the Code of Civil Procedure, which has been held applicable to a case like the present (*Umasoondury Dassy* v. *Brojonath Bhuttacharjee*, I.L.R., 16 C., 347).

The Judge was, therefore, wrong in holding that this suit was not maintainable. We accordingly reverse his decree and remand the appeal for disposal on the merits in the light of the above observations. Costs will abide and follow the result. Sethurayer v. Shunmugam Pillai.

No order is necessary on the memorandum of objections as the lower Court's decree has been reversed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Original Side.)

Present :—Mr. Justice Shephard.

P. M. Srinivasa Chary and others... ... *Plaintiffs* *

v.

V. Rangachariar and others ... ... *Defendants.*

Religious and charitable endowments, suits relating to—Advocate-General, party to it—S. 30, Civil Procedure Code—Leave under S. 30, not condition precedent.

In suits relating to religious and charitable endowments, the Advocate-General may be a party in the same manner as the Attorney-General is in England; but his presence is not indispensable as that of the Attorney-General in England. Any persons interested in such endowments, *e.g.*, devotees, may bring such suits without joining the Advocate-General. P. M. Srinivasa Chary v. V. Rangachariar.

Section 30 of the Civil Procedure Code is permissive and not prohibitive. The granting of leave under that section is not a condition precedent, and may therefore take place after the institution of the suit.

Ramayyangar v. *Krishnayyangar*, I. L. R., 10 M., 185, followed.

There are two classes of cases to which S. 30 of the Civil Procedure Code applies—

1. Cases in which the number of persons claiming concurrent interest in the subject-matter of the suit, and therefore, according to the strict rule, necessary parties to it, is so large that they cannot all be conveniently joined with any chance of bringing the suit to a conclusion.

2. Cases in which numerous persons have distinct but similar rights which might be prosecuted in distinct suits.

In the latter class of cases, anyone or more of the persons interested may institute a suit on his or their behalf without joining the others similarly entitled. If, in any suit so instituted, objection is taken at the proper time, and the court thinks that it would be convenient to have all the others before it, it is competent for it to require an amendment of the plaint and allow the plaintiff or plaintiffs to apply for leave under S. 30, Civil Procedure Code. The omission to take this procedure at the outset is not itself a ground for dismissing a suit.

Jan Ali v. *Ram Nath Mundul*, I. L. R., 8 C., 41 }
Thakersay Dewraj v. *Harbhum Nursey*, I. L. R., 8 B., 450 } dissented from.

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* C. S. No. 122 of 1897. 13th September 1897.

P. M. Srinivasa Cahry v. V. Rangachariar.

Civil suit No. 122 of 1897 on the file of the High Court of Judicature at Madras in the exercise of its original jurisdiction.

This was a suit brought by four persons, members of the Thengalai sect of Triplicane, worshippers and persons interested in the temple of Sri Parthasarathy Swami at Triplicane, praying *inter alia* that the election of defendants 2 and 3 was illegal, void and of no effect, by reason of the several frauds practised at the said elections, one of the frauds being ballot-stuffing.

E. Norton for plaintiffs.

T. V. Seshagiri Aiyar for 1st defendant.

Robert Grant for 2nd defendant.

P. Ananda Charlu for 3rd defendant.

T. V. Seshagiri Aiyar.—The question is whether the present suit brought without the sanction of the Advocate-Genenal and only by two of the Thengalai worshippers is sustainable in its present form. As regards the question whether the Advocate-General should be a party, the earliest case on this point is *Attorney-General* v. *Brodie,* 4 M. I. A., 190. It was there held by the Privy Council that the Advocate-General was entitled to be a party in all proceedings connected with a trust. It is pointed out in *Mayor of Lyons* v. *East India Company,* 1. M. I. A., 175 at p. 192, that the High Courts of India have the same powers which were exercised by the old Supreme Courts and that the Supreme Courts had the same powers which were given to Courts of Chancery in England. It is now settled law in England that no action relating to a charitable trust can be maintained without making the Attorney-General a party. The Advocate-General in India stands in the same position as the Attorney-General in England—*vide* cases collected in Lewin on Trusts. No doubt the Calcutta High Court in *Panchcowrie Mull* v. *Chumroolall,* I. L. R., 3 C., 563, have held that it is not the practice in that Court to make the Advocate-General a party to such proceedings. But the practice in the Calcutta Court does not bind us in Madras.

As regards the second point, I submit that S. 30 bars the present suit. It cannot be denied that the right claimed by the four Thengalai voters in this suit is a right which is common to them and to the 2,800 other voters not made parties to the suit. It is not said in the plaint that these four plaintiffs have any special rights apart from the rights

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belonging to the rest of the community and that any special privileges have been violated. The dictum in 10 M. is exactly in point. As is pointed out, there is nothing to prevent two other voters after the dismissal of the present suit from again litigating the same matter. It is to avoid such multiplicity of vexatious proceedings that S. 30 has been enacted. The decision in 10 M. follows two earlier decisions in *Karuppa* v. *Arumuga*, I. L. R., 5 M. at p. 201, and *Lingammal* v. *Venkatammal*, I. L. R., 6 M., 227. Further, in respect of this very same temple, where parties not on record in a previous suit desire to get the benefit of a decision affecting the temple, it was held in *Ragava* v. *Rajaratnam*, I. L. R., 14 M., 57, that the decision is binding only as between parties to that suit. The Bombay Court in *Bhundal Panda* v. *Pandol Pos Patil*, I. L. R., 12 B., 221, and the Allahabad Court in *Raghubar Dial* v. *Kesho Ramanuj Das*, I. L. R., 11 A., 18, and the Calcutta Court in *Jan Ali* v. *Ram Nath Mundul*, I. L. R., 8 C., 32, held that wherever a dispute is common to a large number of persons, a few of them alone should not be allowed to litigate the matter in court. Further, it has been decided in *Sajedur Raja* v. *Baidyanath Deb*, I. L. R., 20 C., 397, that where the number of persons having a common interest is ascertainable, the only course to be adopted is that prescribed by S. 30 of the Code. It may be contended by the other side that sanction can be given now to convert the suit into one of a representative character. That, I submit, should not be allowed at this stage of the suit. The question of non-joinder was raised at the very beginning and the plaintiffs have chosen to take the decision of the court upon the point. Further, it has been held in *The Oriental Bank Corporation* v. *Gobind Lall Seal*, I. L. R., 9 C., 604, that sanction under S. 30 should not be given after the institution of the suit. Moreover, as is pointed out in *Kali Kanta Surma* v. *Gouri Prosad Surma*, I. L. R., 17 C., 906, the sanction under S. 30 must be given only after the exercise of very careful discretion. In the present case there is not even a statement in the plaint that they are in agreement with the plaintiff in regard to the matter in dispute. On the other hand, I am prepared to file affidavits to show that almost all the voters, excepting a few discontented electors are of opinion that this litigation with regard to the temple which has been going on for the last 25 years, should be at once put an end to. Regarding the sanction of the Advocate-General, I concede that after the decision of our High Court in Full Bench in *Rangasami Naickan* v. *Varadappa Naickan*, I. L. R., 17 M., 462, I cannot maintain the contention.

Robert Grant and *P. Ananda Charlu* said that they agreed in *Mr. Seshagiri Aiyar's* contention.

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Norton.—I contend in the first place that S. 30 is only permissive and not imperative. Every voter in a temple has a right to see that its affairs are administered by honest people. The mere fact that others are willing to sit quiet is no reason why persons who take a real and active interest should not get dishonest men removed from office. I further contend that the Madras cases quoted have no application to this case. They all relate to the peculiar constitution of a tarwad in the West Coast, and the question decided in those cases was that, unless a decree is obtained under S. 30 against all the members of a tarwad, it cannot bind the tarwad. Nor does the case of *Bhundal Panda* v. *Pandol Pos Patil*, I. L. R., 12 B., 221, apply. There, a right to property was in dispute. On the other hand in 2, 3 and 8 Bombay, it has been held that any person interested can maintain such a suit without joining with himself others equally interested. The cases in 8 and 11 C. have gone further than the language of S. 30 warrants. There is no Madras case, so far as I can see, which goes the length of dismissing the suit under such circumstances. If your Lordship be of opinion that the suit should be brought by all the persons interested, I submit I am entitled to get that sanction now.

Shephard, J.—All that you mean to contend is that the suit is not *ipso facto* bad, and that the granting of sanction would meet the requirements of the case set up by the other side.

Norton.—Yes, that is my contention. I submit that the dictum in 10 M. 185 to the effect that where the sanction of the Advocate-General was not obtained before the institution, the same can be procured at any stage of it, clearly supports my view.

Shephard, J., to Seshagiri Aiyar.—What do you say to my granting sanction now ?

T. V. S.—The case in 10 M. refers to the sanction of the Advocate-General for the institution of the suit. This is not a case of a party being added in the course of a suit.. The case in 9. C. is exactly in point, and 10 M. does not apply. Further, S. 32 distinctly says that no person shall be added as co-plaintiff without his consent. Supposing the other Thengalai voters refuse to join, then they cannot be made parties against their will, and again this will essentially change the character of the suit.

Robert Grant (on the same side) contended that under S. 34, inasmuch as objection to want of parties was taken before and the defect was not rectified, no new parties could be brought on record now.

On the preliminary issue his Lordship delivered the following

JUDGMENT :—The issue which I have to try refers me to the written statements of the defendants and the objections therein stated to the maintenance of this suit. The written statement of the 1st defendant states two grounds of objections. It says, that "the suit is bad, as it was not brought in conformity with S. 30 of the Civil Procedure Code," and the objection is taken that the sanction of the Advocate-General was not obtained. This latter objection was abandoned by the defendants' vakil in deference to the ruling of this Court in *Rangasami Naickan* v. *Varadappa Naickan*, I. L. R., 17 M., 462. In lieu of it, however, he took a point which is not raised in the pleadings, namely, whether the Advocate-General ought not to be made a party to the suit. It will be convenient to dispose of that point at the outset. In England there can be little doubt that a suit framed as this is, alleging no proprietary right in the plaintiffs and no particular injury suffered by them but complaining of a grievance common to an indefinite number of persons, could not be maintained. A suit of such a character could only be instituted by the Attorney-General (*The London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee*, 1892, 3 Ch. pp. 257, 270 and cases cited). I think it is rather to be regretted that there has been in the courts of this country a departure from the English practice; but that certainly appears to be the case, and the authorities cited by the defendants' vakil do not go beyond showing that the Advocate-General may be a party to suits relating to charitable endowments in the same manner as the Attorney-General in England. In *Attorney-General* v. *Brodie*, 4 M., I. A., 190, the question arose on a petition presented by a private individual, entitled in a cause instituted by the Advocate-General for the administration of certain charitable trust created under a will. On this petition coming before the Court, the Advocate-General claimed the right to appear, and be heard. The Supreme Court held that he had no right to appear, and accordingly refused to hear him. All that was decided by the Judicial Committee was that this singular decision, as they call it, was wrong.

In the Bombay case, *Advocate-General* v. *Visvanath Atmaram*, 1 B. H. C. R. 9, the question was seriously argued before the Supreme

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Court whether the Advocate-General could institute a suit for the administration of a Hindu religious trust.

While it was held that the suit was maintainable in the name of the Advocate-General, it was not decided that he *was an indispensable party*. In more recent times, it has been distinctly held both in Calcutta and in Bombay that a suit, which in England would be instituted only in the name of the Attorney-General, may be maintained by persons interested in a religious endowment in their own name and without joining the Advocate-General (*Panchcowriemull and others* v. *Choomroolall and others*, I. L. R., 3 C., 563; *Thackersey Dewraj* v. *Hurbhum Nursey*, I. L. R., 8 B., 452). In the Calcutta case decided in 1878 the plaintiffs were merely representatives of the sect interested in the temples benefited by the will, for the construction of which the suit was instituted. In the Bombay case, the plaintiffs were subscribers to the temple fund and devotees of the idol. They were held to have a sufficient interest to entitle them to sue in their own name for the proper administration of the temple fund.

In the present case, the plaintiffs describe themselves as worshippers at the temple known as Sri Parthasarathy Swami Temple and entitled to vote on the election of Dharmakartas. I am of opinion that the suit is maintainable, notwithstanding that the Advocate-General has not been joined.

I now come to deal with the objection founded on S. 30 of the Civil Procedure Code. It is objected that the suit cannot be allowed to proceed in its present form and without notice being given to the other members of the class to which the plaintiffs belong. It is further objected that the permission of the court indicated by the section must be obtained before the institution of the suit and cannot be given afterwards.

Now in the first place, it is to be observed that the section is permissive and in no way prohibitive in its terms and, furthermore, that it is a section dealing with procedure only and not affecting substantive rights.

The rule of the Court of Chancery to which the section owes origin, appears to have been made applicable in two classes of cases. There are the cases in which the number of persons, claiming

concurrent interests in the subject-matter, and therefore, according to strict rule, necessary-parties to the suit, is so large that they cannot all be conveniently joined with any chance of bringing the suit to a conclusion. And there are the cases in which numerous persons have distinct but similar rights which might be prosecuted in distinct suits. For instance, there is the case of numerous creditors of the same person, or that of many persons claiming a right of common or right of fishing in respect of the same property. (*Smith* v. *Earl Brownlow*, L. R., 9 Eq. 241, and Danniell's Chancery Practice, p. 207.)

In the latter class of cases, for the sake of convenience and to prevent multiplicity of suits, the court allowed one person or a few persons to prosecute or defend suits on behalf of all the persons similarly interested. The judgment obtained in a suit so framed is binding on all the parties so represented in it. The present case appears to me to belong rather to the latter than the former class of cases. If I am right in considering that the plaintiffs, as worshippers at the temple and entitled to vote on the election of Dharmakartas, possess an interest entitling them to sue, I think it is clear that they can sue without joining the other persons similarly entitled. That being so, and there being no words either imperative or prohibitory in the section, I think it cannot be a fatal objection to the suit that it is not expressed to be instituted on behalf of those other persons. If the course prescribed by S. 30 is not followed in a case like the present, the only consequence in my opinion is that the judgment does not bind the persons whose names are not in the record. (See I. L. R., 14 M., 496, *ib.* 57, and *May* v. *Newton*, 34 Ch. D. 347.) To obviate this inconvenient consequence, I think it is competent to the court with the view of adjudicating completely and definitely on the matter in dispute to require an amendment of the plaint.

The language of the judgment chiefly relied on by the defendant's vakil (I. L. R., 8 C., 41) indicates a different view of the section, for it is said that, inasmuch as the plaintiffs, claiming an interest in common with others, had not obtained leave under S. 30, their suit must necessarily be dismissed. It seems to have been considered that the granting of leave under the section would have made up for the insufficiency of interest disclosed in the plaint.

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With great deference that view appears to me incorrect. Nor do I fully understand the judgment in the Bombay case relied upon by the plaintiff's counsel (I. L. R., 8 B., p. 450.) As far as I ascertain the facts of the case, I should have thought it was a case for the application of S. 30.

The conclusion at which I arrive is that the omission to apply under S. 30 is not by itself ground for dismissing the suit, but that, nevertheless, now that the objection has been taken, it ought not to be allowed to proceed except on the terms of the plaint being amended and the requisite leave under S. 30 being obtained.

The granting of leave under the section is not made a condition precedent, and may, therefore, I think, take place after the institution of the suit (I. L. R., 10 M., 185.)

I understand there is no objection on the plaintiffs' part to the course which I indicate. If, as the defendants' counsel suggests, there are worshippers who differ from the plaintiffs as to the propriety of the election, the court will know how to deal with them. (See *Watson* v. *Cave*, 17 Ch. D. 19.)

Costs reserved.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur Collins, *Kt.*, Chief Justice, and Mr. Justice Shephard.

Subrahmanian Chetti ... ... Appellant* (*3rd Defendant*)

v.

Authinarayanan ... ... Respondent (*Plaintiff*).

Subrahmanian Chetti v. Authinarayanan.

Civil Procedure Code, Ss. 13 and 14—*Res judicata*—Cause of action—Titles different.

Plaintiff first sued the defendants in ejectment as adopted son of last owner. The suit was dismissed. He now sued the same individuals for the same relief as devisee under a will of the deceased.

Held: that the present suit was not barred either under S. 13 or S. 43 of the Civil Procedure Code by reason of the former suit and the decision therein.

Kameswar Pershad v. *Rajkumari Ruttun Koer*, L. R., 19 I. A., 234, distinguished.

* A. A. O. No. 100 of 1896. 5th October 1897.

Appeal against the order of the District Court of Madura, in A. S. No. 94 of 1896, presented against the decree of the Court of the District Munsif of Madura in O. S. No. 814 of 1894. Subrahmanian Chetti v. Anthinarayanan.

The plaintiff sued to recover the property of N. G. K. who died in 1881 leaving a will by which he bequeathed the property to the plaintiff, who was then a minor. In O. S. No. 80 of 1892, the plaintiff had sued the defendants for recovery of the same property claiming as adopted son of the testator. The Courts had then found against the adoption and dismissed the suit. The plaintiff then brought the suit claiming under the will. The District Munsif dismissed the suit as offending against the principle of *res judicata* following L. R., 19 I. A., 234. On appeal the District Judge reversed the Munsif's judgment on the question of *res judicata*, and remanded the case for disposal on the merits. The defendants then appealed to the High Court.

C. R. Pattabhirama Aiyar and *K. N. Aiya* for appellant.

M. K. Vaidyanatha Aiyar for respondent.

The Court delivered the following

JUDGMENT:—We think *Kameswar Pershad* v. *Rajkumari Ruttun Koer*, L. R., 19 I. A., 234, is clearly distinguishable from the present. There the Judicial Committee held that the agreement on which the second suit was founded ought to have been put forward in the first suit.

Here the two suits present two perfectly distinct grounds of claim. In the first suit, the plaintiff claims by virtue of an alleged adoption. In the second suit, it is a will which is put forward as giving title to the property. A person who takes by adoption is obviously in a totally different position from one who takes under a will. We have no copy of the will before us, and it may well be that the one claim is even inconsistent with the other.

We must dismiss the appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Davies and Mr. Justice Boddam.

Theyya Velan ... ...Appellant * (*Plaintiff*)

v.

Kochan and another... ... ...Respondents (*1st & 2nd Defendants*).

Theyya Velan *v.* Kochan.

Civil Procedure Code, S. 317—Certified purchaser—Benami for family—Assignee from certified purchaser not entitled to the protection of S. 317.

The protection given by S. 317, Civil Procedure Code, must be limited to the certified purchaser alone and cannot be extended to his assignees.

Second appeal against the decree of the Subordinate Judge's Court of Calicut in A. S. No. 358 of 1895, varying the decree of the Court of the District Munsif at Temelprom in O. S. No. 424 of 1893.

The plaintiff sued for partition and for recovery of properties, moveable and immoveable, belonging to the joint family of the plaintiff and the 1st defendant. Some of the plaint properties had been originally attached in execution of the decree in O. S. No. 217 of 1873 on the file of the District Munsif's Court of Palghat passed against the plaintiff and the 1st defendant and purchased by one P, benami for the family, and had been afterwards reconveyed by P to the family in the name of the 1st defendant, the manager. Among other pleas, the 1st defendant contended that the plaintiff cannot get a, share in these properties, inasmuch as he was an assignee from P, and that as against P the plaintiff's suit was barred by S. 317, Civil Procedure Code. The Munsif decreed the plaintiff's suit. The District Judge on appeal upheld the 1st defendant's contention with respect to the properties that he had obtained from P by transfer. The plaintiff then preferred this second appeal to the High Court.

V. Ryru Nambiar for appellant.

P. R. Sundara Aiyar and *P. K. Subrahmania Aiyar* for respondents.

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* S. A. No. 633 of 1897. 23rd September 1897.

Theyya Velan v. Kochan.

The Court delivered the following

JUDGMENT :—S. 317 of the Code of Civil Procedure debars a suit against a certified purchaser by a person claiming to be the real purchaser or deriving title from the real purchaser.

The contending parties here do not occupy the position contemplated in the section, as the 1st defendant is not the certified purchaser but an assignee of the certified purchaser. The assignment by the certified purchaser to the 1st defendant does not clothe him with the certified purchaser's right to object to the unsustainability of a suit as if it had been brought against himself. The protection given to the certified purchaser cannot be transferred by him. The 1st defendant did not therefore stand in the certified purchaser's shoes as the Sub-Judge has held.

We must accordingly reverse his decree and remand the appeal for disposal upon the merits.

Costs to abide the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Benson.

Tirupathi Goundan ... ... Appellant* (*Plaintiff*)

v.

Rama Reddi ... ... Respondent (*Defendant*).

Tirupathi Goundan v. Rama Reddi.

Pro-note, unconditional undertaking to pay—Negotiable Instruments Act XXVI of 1881, S. 4—Acknowledgment and General Stamp Act I of 1879, Sch. I, Art. 1.

A document ran as follows: "The amount which I have this day received from you in cash is Rs. 700. This sum *I am bound to pay you.* Therefore, adding to this sum interest at * * * *I am liable to pay* * * *"

Held: that it was not a promissory note as the words "I am bound to pay" or "I am liable to pay" do not amount to an undertaking to pay.

Second appeal against the decree of the District Court of Salem in A. S. No. 47 of 1895, confirming the decree of the Court of the District Munsif of Krishnagiri in O. S. No. 56 of 1894.

This was a suit to recover Rs. 825-14-0, money lent on an oral agreement to repay with interest. Plaintiff produced an unstamped

* S. A. No. 12 of 1896. 30th March 1897.

document in support of his claim which ran thus: "The account executed on......by......to...... The amount which I have this day received from you in cash is Rs. 700. This sum I am bound to pay you. Therefore, adding to this sum interest at...... I am liable to pay...... This is the account in this manner executed with my consent." The defendant contended that the document was not an account but a promissory note and not being stamped, it was not admissible in evidence. The Court below held the document a pro-note and inadmissible in evidence and dismissed the suit. The plaintiff then preferred this second appeal.

P. S. Sivaswami Aiyar for appellant.

E. B. Powell for respondent.

The Court delivered the following

JUDGMENT :—The question is whether the document of the 2nd February of 1891 relied on by the plaintiff is a pro-note within the meaning of S. 4 of "The Negotiable Instruments Act, 1881," or mere acknowledgment of liability falling under Article 1 of Schedule I. of the General Stamp Act, or an agreement.

If it is a pro-note, the suit must fail, as rightly decided by the lower Courts. The correct translation of the document is set out in para. 2 of the judgment of the lower appellate Court.

The only question is whether the words therein "I am liable to pay" can be held to be an "undertaking to pay within the meaning of S. 4 of the Act. The construction depends on the actual words used rather than on what their effect may be as regards the rights of the parties. Examining the document in this light, we are of opinion that the words do amount to acknowledgment of liability to pay.

The words "I am liable to pay" do not, in fact, mean anything more than the previous words in the document, "I am bound to pay" which clearly do not constitute an undertaking to pay.

We must, therefore, hold that the document is not a pro-note and the plaintiff's claim as a suit for money lent is sustainable.

We set aside the decrees of the Courts below and remand the suit for disposal according to law. Costs hitherto incurred will abide and follow the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Davies.

Uthunganakath Avuthala ... ... Appellant * (*Plaintiff*)

v.

Thazhatharayil Kunhali and others ... Respondents (*Defendants 4 and 7 to 10*).

Uthunganakath Avuthala *v.* Thazhatharayil Kunhali.

Madras Act, I of 1887, Ss. 6 & 7—Improvements, tenant's compensation for—Rent reduction of.

The words "right of a tenant to make improvements and to claim compensation for them" in S. 7 of Madras Act I of 1887, have reference not only to improvements to be made subsequent to the contract of the tenant, but also to improvements effected by the same tenant and under a previous lease before the contract.

Per. Davies, J.—The section refers to all improvements effected by a tenant after the 1st day of January 1886.

Where a tenant after the expiration of a lease takes up a fresh lease from his landlord at a lower rent than that of the previous lease in consideration of his giving up his claim to compensation for improvements effected under the prior lease.

Held: that under S. 7 of Act I of 1887 (Madras) the provision in the lease taking away the right of the tenant to the improvements was void.

Per. Subrahmania Aiyar, J.—(*Davies, J.*, dissenting) that in ascertaining the improvement in such a case the fact that the second lease was given at a lower rent is not to be taken into consideration as that does not amount to "a reduction or remission of rent or any other advantage" within the meaning of S. 7.

Second appeal against the decree of the Subordinate Judge's Court of Palghat in A. S. No. 816 of 1895, confirming the decree of the Court of the District Munsif of Kutnad in O. S. No. 18 of 1895.

The facts of the case appear sufficiently from the judgment of *Subrahmania Aiyar, J.*

C. Krishnan for appellant.

P. R. Sundara Aiyar for 2nd and 3rd respondents.

The Court delivered the following

JUDGMENTS:—*Subrahmania Aiyar, J.*—Though the amount involved in this case is small, the questions raised are not unimportant.

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* S. A. No. 1445 of 1896. 7th September 1897.

Uthunganakath Avuthala v. Thazhatharayil Kunhali.

The facts of the case are briefly as follows :—

The land for the possession of which the plaintiff (appellant) sued in this case, had, many years ago, been originally demised by the assignor of the plaintiff to the first defendant's father. After the father's death, the first defendant succeeded to the possession of the land; but in 1890 he executed to the landlord Exhibit A. By that instrument it was provided that the first defendant was to hold the land for one year and to surrender it at the end of the term. The instrument further stated that the landlord having agreed to the first defendant holding the land for the year at a rent which was less (by six *paras* of paddy worth about Rs. 3) than what was payable under the instrument of demise executed when the land was originally let to the first defendant's father, the defendant agreed not to claim compensation for certain improvements made by way of reclamation after Madras Act I of 1887 came into force. The value of these improvements amounting to Rs. 60-14-0 was directed by the lower Courts to be paid by the plaintiff, notwithstanding the provision in Exhibit A respecting such compensation.

The first question for decision is whether the last mentioned provision in Exhibit A is invalid under section 7 of the enactment referred to. That section runs as follows :—"Nothing in any contract between a landlord and a tenant made after the 1st day of January 1886 shall take away or limit the right of a tenant to make improvements and claim compensation for them in accordance with the provisions of this Act."

The argument on behalf of the appellant in support of the contention that the lower Courts were wrong in awarding the compensation in question was this. The words "to make improvements and to claim compensation for them" refer only to improvements to be made in the future and to compensation which might become due in respect thereof. A contract, however, relating to compensation for improvements already effected does not fall within the section and the clause in question in Exhibit A, which refers to such past improvements, is therefore valid. This contention is, no doubt, plausible, but in my opinion, it is not sound.

The necessity for the Legislature taking the extreme step of depriving Malabar tenants of their power to enter into contracts

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with their landlords in regard to improvements arose from well known local causes. A great deal of the land in Malabar, cultivated or waste, belongs to comparatively a very few *Jenmies*. The rest of the people, who are mostly agriculturists, have, to earn their livelihood, to obtain what land they want from these jenmies. So long as there was not much demand for land the condition of tenants was not very bad. But with the keen competition for the possession of land which has been for a considerable time prevailing, the state of things altered. Evictions attended with serious crime became not unusual; the compensation awardable for improvements made by tenants being generally far below the real value of the improvements. Such a state of things required to be checked and the condition of tenants called for amelioration. Act I of 1887 was the first instalment of legislation intended to bring about a salutary change. In these circumstances, it is difficult to believe that the Legislature meant to prohibit only contracts relating to improvements to be effected after such contracts. No doubt, the majority of tenants in Malabar, who are ignorant men, may perhaps not be as quite able to realize the value of the right to compensation for improvements to be made as they would be to realize the value of the right to compensation for improvements already made. Very likely also the desire of tenants to secure land for cultivation may, at the time of the creation of tenancies, induce them too readily to disclaim compensation for future improvements. But on the other hand, it must not be forgotten that the desire to retain land once taken and improved is with these tenants not unnaturally far stronger than even the desire to obtain land for the first time. Consequently, the probability of tenants being improperly induced to enter into improvident contracts with reference to compensation for improvements already made is certainly less strong than the likelihood of their entering into such contracts with reference to future improvements. Looking, therefore, to the reason of the section in question, there can be little doubt that the Legislature intended to prohibit contracts relating not only to future but to past improvements also. This view is confirmed by the provisions of S. 4 of the Act. The effect of the section is that a tenant shall not, at the time of the eviction, be prejudiced by any custom which will deprive him of his right to compensation for whatever improve-

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ments made during the tenancy, whether by himself or by his predecessors in interest. While thus the Legislature, true to its object, has excluded the operation of custom with regard to improvements made since the creation of the tenancy till the time of the eviction, would it be reasonable to hold that a tenant may, by a contract, prejudice himself in the matter of the improvements made in the course of the tenancy but prior to the contract? To so limit the scope of S. 7 would be anomalous and would defeat the clear object of the Legislature. The provision in Exhibit A on which the plaintiff relies must, therefore, be held to be invalid and in no way to affect the right to compensation for the improvements in dispute.

The second question for decision is whether in determining the amount of compensation to be awarded, the circumstance that the rent payable under Exhibit A was less than that payable under the prior instrument of demise, should be taken into consideration as falling under clause *c*. of S. 6 of the Act.

As to this, the contention on behalf of the plaintiff was twofold. One was that the first part of the clause applied to the case and that within the meaning of that part was, according to the facts here, "a reduction of rent" given by the landlord to the tenant for which due allowance should be made in favour of the landlord. In order to see what force there is in this contention it is necessary to bear in mind the precise position in which the parties to Exhibit A stood with reference to each other when the document was executed. Now before its execution, the tenancy, that commenced in the 1st defendant's father's lifetime and was continued by the first defendant, seems to have been one from year to year. But in 1890 that tenancy was determined by the mutual consent of the landlord and the tenant and the accounts relating to the rent payable in respect of that tenancy were settled and the balance due was paid up. Then came into existence Exhibit A, whose terms, even if they had been the same as those of the prior demise, would clearly mark the creation of a fresh tenancy. Not the less so certainly while the terms, as has already been seen, are different; since the tenancy under Exhibit A was for a year certain, although the tenant, as a matter of fact, held over. Can it be said under these circumstances that there was a "reduction of rent"? Now these words imply a

lessening of a liability created by the contract under which the property improved was demised. No doubt in letting the land again at the smaller amount, which was reserved as rent in Exhibit A, the landlord showed a favour to the tenant. But the favour was one which did not relieve the tenant to any extent from the payment of anything due under the demise with reference to which the improvements were made. It follows that the facts relied on did not amount to a "reduction of rent" as contended for the plaintiff.

Uthunga nakath Avuthala v. Thazhatharayil Kunhali.

The second contention was that though there might not have been a "reduction of rent," yet there was an "advantage" given by the landlord to the tenant within the meaning of the latter part of the clause. Now the word "advantage" in that part is qualified by the term "other" and in a context such as that under consideration, on the principle of *ejusdem generis*, "other" means "other such like." But, from what has just been said with reference to the reduction of rent, it will be seen that the advantage given to the first defendant in allowing him to hold under Exhibit A at the smaller amount of rent mentioned therein, was one which did not relieve the defendant partially or wholly from any subsisting liability. Such advantage cannot, therefore, be held to be similar to a 'reduction or remission of rent,' the particular kinds of advantage the enumeration of which precedes the general words 'other advantage' in the clause and which, of course, as already stated imply a discharge partial or complete from an existing obligation. The latter part of the clause also is, therefore, inapplicable.

Lastly, as to the costs awarded to the respondents on account of the fee paid to the Commissioner, who was deputed to ascertain the value of the improvements, I do not think that there is sufficient ground for interfering with the discretion exercised by the lower Courts. (See *Narayana* v. *Narayana*, I. L. R., 8 M., at p. 289.)

I would, therefore, dismiss the second appeal with costs.

Uthunga-nakath Avuthala v. Thazha-tharayil Kunhali.

Davies, J.—The first question raised by the plaintiff (appellant) is whether the 1st defendant was bound by his agreement in A not to demand compensation for his improvements. With reference to S. 7 of the Malabar compensation for Tenants' Improvements Act, 1887, it was argued that that section, applies to improvements to be made after the date of the contract; but I think it is clearly intended to refer to any improvements made after the first day of January 1886, whether the contract be made prior to or subsequent to the making of such improvements. The contract in this case was made in 1890, but it related to improvements admittedly made after the 1st day of January 1886. I, therefore, hold that it was void under S. 7 of the Act and was therefore not binding on the 1st defendant and, therefore, not upon those who claim through him.

The second question raised is whether the plaintiff is not entitled to deduct from the compensation payable the value of a certain reduction made in the rent in consideration of the said improvements. The amount of the reduction was 6 *paras* of paddy per annum, and this reduced rate of rent was enjoyed for 5 years; so that 30 *paras* of paddy is the amount claimed in reduction by the plaintiff under clause *c.* of S. 6 of the Act. I think the plaintiff is clearly entitled to make this deduction from the value of the improvements payable by him. It was urged that the reduction of rent, in order to be a good set-off against the value of improvements, should have been made in an existing rental, and not upon a new rental agreement such as A. is. But I find that Exhibit A was only a renewal of an old lease held by the 1st defendant's father from the year 1889, and it may, therefore, be taken to be a continuation of the old lease and not a new lease. Even, however, if it was otherwise and the 1st defendant had been a stranger and a new comer, he did as a fact get a reduction of rent upon the former lease amount in consideration of the improvements which he had acquired from the last tenant in whose shoes he stood in regard to them, and, therefore, it seems to me quite

immaterial whether it was upon the old lease or the new one that the reduction is claimable, the fact being that in consideration of such improvements as existed on the land, the value of which the landlord has now to pay the tenant, the latter did get a reduction of rent.

Uthunganakath Avuthala v. Thazhatharayil Kunhali.

The only other point is whether the plaintiff was chargeable with the whole of the costs of the commission, *viz.*, Rs. 15, the Commissioner's fee. I think that as the defendants made a claim for more than double what the Commissioner has found to be due to them, the fee for the Commissioner should have been divided equally between the plaintiff and the defendants as one side has gained as much as the other.

The result is that there should be deducted from the amount payable for improvements by the plaintiff the value of 30 *paras* of paddy, namely, Rs. 15, the amount by which the rent was reduced and that the amount of the Commissioner's fee payable by the plaintiff to the defendants is reduced from Rs. 15 to Rs. 7½. With these modifications, I would dismiss the second appeal with proportionate costs.

[Under S. 575 of the Code of Criminal Procedure, the judgment of *Mr. Justice Subrahmania Aiyar* prevails and the second appeal is dismissed with costs].

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Shephard and Mr. Justice Davies.

Venkata Krishna Rao ... ... Appellant * (*Plaintiff*)

v.

Venkatachalam and others ... Respondents (*Defendants*).

Mortgage by conditional sale—Sale with a condition for re-purchase—Transfer of Property Act, § 58, *cl.* (*c*).

Venkata Krishna Rao v. Venkatachalam.

A deed of sale after reciting the consideration, the description of property sold and usual covenants for title, contained the following provisions, that in the event of the vendor paying back the purchase money with interest at Rs. 1-9-0 per cent. per

* S. A. No. 1392 of 1896. 10th September 1897.

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month at a particular time named in the document, the vendor was to recover the land, and that, in the interval, the vendee was to take possession of the property, collect the kist, and, after paying the Sircar dues, credit the balance towards the interest payable by the vendor. It was not proved that there was any great disparity between the actual value of the property and the amount for which it purported to be sold.

Held: that the document was a deed of sale with a condition for re-purchase and not a deed of mortgage by conditional sale.

Second appeal against the decree of the District Court of Godavari in A. S. No. 322 of 1895, confirming the decree of the Court of District Munsif at Rajmahandry in O. S. No. 454 of 1894.

The plaintiff sued to redeem some property in the possession of the 1st defendant on payment of what may be found due to him on taking of accounts. Thirumal Row, the father of the 2nd defendant, the original owner of the property, sold it to the father of the 1st defendant by a deed of sale, dated 13th November 1879. The portion of the deed relevant to the present report ran thus :—

"Further, it is arranged that, in the event of my paying to you the said purchase amount of Rs. 100, together with interest thereon at Rs. 1-9-0 per cent. per month on the 1st Kartika Suddha of Subhanu (31st October 1883), you should deliver back to me this land and this document as well as the deed of gift appended hereto, and that out of kist realized from the ryot by you and me in respect of this land before this limited time, all the assessments payable to the Sircar being deducted, the balance of kist should be credited towards the interest payable by me."

The plaintiff as assignee from Thirumal Row of the right to redeem the plaint property contended that the apparent deed of sale to the father of the 1st defendant was only a mortgage, and that he was entitled to redeem. On the other hand, the 1st defendant contended that the deed in question was a deed of sale and not one of mortgage, and as the date fixed in the deed for re-purchase, *i.e.*, 31st October 1883, had passed, the plaintiff's suit was not sustainable. With regard to the conduct of the parties after the sale, the following facts appeared in the evidence :—(1) In a suit brought in 1881 to redeem this very property by a former assignee of the property (who subsequently re-transferred it to Thirumal Row), the 1st defendant's father did not plead that the deed was an absolute sale and not a mortgage, but only pleaded that the suit was

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pre-mature; (2) In a sale deed executed by the 1st defendant in 1887, he covenanted with the lessee in the following terms: "If the original owners desire to redeem the land from me within the expiration of this period, and if I intend to give it up, you should deliver possession to me irrespective of this term." It was not proved that there was any great disparity between the actual value of the property and the amount for which it was sold. The Courts below held that there was an absolute sale to the 1st defendant's father in 1879, and dismissed the suit. The plaintiff then preferred this second appeal.

V. Krishnaswami Aiyar and *R. Kuppuswami Aiyar* for appellant.

The Officiating Advocate-General (*V. Bhashyam Aiyangar*) and *K. N. Aiya* for respondents.

V. Krishnaswami Aiyar.—The deed in question creates a mortgage, not a sale. The provisions of the document are exactly what you will find in a deed of usufructuary mortgage. When a doubt arises, the sole point to be consider is whether the parties intended a debt to be subsisting between the parties between the date of sale and the date fixed for re-purchase. In this case (1) the vendor is to pay interest on the purchase money when it is to be repaid, and (2) the vendee is to account for the mesne profits accruing during the interval and credit the balance of kist after paying Sircar dues towards interest. These provisions are absolutely inconsistent with the relation of vendor and vendee. Further, the conduct of the parties subsequent to the transaction has to be looked to. In the suit of 1881 to redeem these very lands on the footing of a mortgage, the 1st defendant never set up the plea that there was no mortgage. In 1887, long after the date fixed in the document for repurchase, the defendant has admitted in a lease-deed that the original owners might redeem. *Vide* 2 Spence's Equity, 619; *Venkatasubbayya* v. *Venkayya* I. L. R., 15 M., 230; *Ayyavayyar* v. *Rahimansa, Ib.*, 14 M., 170; *Bapuji Apaji* v. *Senavaraji Marvadi, Ib.*, 2 B., 244—246.

The other side was not called.

The Court delivered the following

JUDGMENT:—The mere circumstance that interest is stipulated for by the parties does not by itself indicate that a document which apparently is a sale was intended to be a mortgage. It

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might be important as indicating that there was a subsisting debt secured by the instrument. But the mention of interest is accounted for by the intention of the parties to arrange before-hand the terms on which the re-conveyances were to take place. The profits and the interest were to be set off against each other. Except the mention of interest, there is no indication of an intention to create a mortgage security. The finding as to the value of the property as throwing light on the intention of the parties cannot be questioned here.

We must dismiss the appeal with costs.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

FULL BENCH.

Present:—Sir Arthur Collins, *Kt.*, Chief Justice, and Mr. Justice Shephard, Mr. Justice Subrahmania Aiyar and Mr. Justice Benson.

In Cr. Rev. Case No. 472 of 1896, Case referred No. 184 of 1896.

Appalamma ... ... Complainant* in *Maintenance Case No. 27 of 1896 on the file of the Head-quarter Deputy Magistrate of Godaveri District.*

v.

Yellayya ... ... (*Defendant*).

In Cr. Rev. Case No. 505 of 1896, Case referred No. 203 of 1896.

Perianayagam ... ... Complainant * in Miscellaneous Case No. 31 of 1896 on the file of the 1st Class Sub-Divisional Magistrate of Kumbakonam.

v.

Kishna Chetti ... ... *Defendant.*

Appalamma v. Yellaya and Perianayagam v. Kishna Chetti.

Criminal Procedure Code, S. 488—Adultery—Indian Penal Code, S. 497.

Adultery on the part of the husband, not being such adultery as would justify a conviction under the Indian Penal Code, may nevertheless constitute sufficient cause for the wife living separately from her husband, and enable her to claim maintenance under the Criminal Procedure Code. But in determining whether the cause shown by the wife for refusing to live with her husband is good and reasonable, regard must be had to the social ideas and customs of the community to which the parties belong.

The word *adultery* in S. 488, Criminal Procedure Code, is not to be limited to the restricted definition given of it in S. 497, I. P. C.; but it should be construed in the ordinary and wider sense of voluntary sexual connection between either of the parties to a marriage and some one, married or single, of the opposite sex other than the offender's own spouse.

Per Shephard and *Benson, J.J.*:—The words "living in adultery" in S. 488, Criminal Procedure Code, refer to a course of continuous conduct and not to mere isolated act, of adultery.

Queen-Empress v. *Mannathachari, I. L. R.*, 17 M., 260, overruled.

Case referred for the orders of the High Court under S. 488, Criminal Procedure Code, by the Acting Sessions Judge of Godavari in his letter of 16th October 1896, No. 5108.

Case referred for the orders of the High Court under S. 488 of the Criminal Procedure Code by the Acting Sessions Judge of Tanjore in his letter of the 6th November 1896, No. 801.

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* Cr. Rev. Cases Nos. 472 and 505 of 1896. 20th July 1897.

Appalamma v. Yellaya and Perianayagam v. Kishna Chetti.

In Criminal Revision Case No. 505 of 1896 the wife applied for maintenance from the husband who admitted that he was keeping a concubine for 20 years continously. The Magistrate awarded a sum of Rs. 2-8-0 for the maintenance.

In Criminal Revision Case No. 472 of 1896, it was proved that the husband left for Vizagapatam sometime before the institution of the suit with a widow and lived with her. ...

These cases coming on for orders on 23rd November 1896 before their Lordships *Shephard* and *Benson,* J. J., upon perusing the letters of reference and the records submitted therewith, the Court made the following

ORDER OF REFERENCE TO FULL BENCH.

As the question involved in these two cases is one of some importance and we do not agree with the decision in *Queen-Empress* v. *Mannathachari,* I. L. R., 17 M., 260, we resolve to refer for the decision of the Full Bench the following question, viz.:—

Whether adultery on the part of the husband, not being such adultery as would justify a conviction under the Indian Penal Code, may, nevertheless, constitute sufficient cause for the wife separating from her husband and enable her to claim maintenance under the provisions of the Criminal Procedure Code?

These cases coming on for hearing on the above reference on Tuesday, the 23rd February 1897, before a Full Bench, consisting of their Lordships the *Chief Justice, Shephard, Subrahmania Aiyar* and *Benson,* J. J., and the cases having stood over for consideration till Tuesday, the 20th July 1897, their Lordships expressed the following

OPINIONS.

The Chief Justice:—I think it would be wrong to limit the meaning of the word "adultery" in S. 488, Criminal Procedure Code, to the very limited definition of the word in S. 497 of the Penal Code. Adultery is a crime under that section that can only be committed by a man having sexual intercourse with the wife of another without the consent or connivance of the husband of that wife,

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S. 488 of the Criminal Procedure Code provides for the maintenance of the wife and enacts that a Magistrate may make an order of maintenance in favor of the wife, even though the husband offers to maintain his wife on condition of her living with him if the Magistrate is satisfied that the husband is living in adultery. The term adultery is used in that section in the ordinary sense, that is, a married man having sexual intercourse with a woman who is not his wife. It appears to me that this construction is not affected by the last words of S. 4 of the Criminal Procedure Code, but is consistent with it. It is clear that a different intention appears from the subject or context.—See the first part of S. 4.

A difficulty must always arise in deciding in what cases the adultery of the husband is sufficient cause for the wife to claim maintenance. Amongst the Hindu community concubinage is recognized, and it is possible for concubines to have a certain status. If, therefore, a husband keeps a concubine in a house apart from his wife, it is doubtful if such an act alone would entitle the wife to separate maintenance; but if he kept such concubine in the same house as his wife lived in and against her wishes or in such a manner as to offend the self-respect of his wife, in my opinion that would entitle the wife to separate maintenance under S. 488, Criminal Procedure Code.

I answer the question referred to the Full Bench in the affirmative.

Shephard, J.—I have nothing to add to the observations (*a*) already made by me about the applicability of the Penal Code definition of 'adultery.' The solution of the question, what conduct on the part of the husband amounts to 'living in adultery' within the meaning of the Criminal Procedure Code is, however,

(*a*) [I do not think we are compelled to put such an unreasonable interpretation on the language of the Legislature as the Sessions Judge suggests. Adultery, according to the Penal Code, is an act capable of being done by a man only. It is an offence committed by a third person against a husband in respect of his wife. In the Criminal Procedure Code, the term *adultery* is used in the larger and ordinary sense. Either the husband or the wife may be guilty of it. It is with the breach by either party of the marriage obligation, not with the offence of a third party, that S. 488, Criminal Procedure Code, is concerned. If the

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not much advanced by the conclusion that the Penal Code definition cannot be applied. The words point to a continuous course of conduct, and not to isolated acts of immorality. But conduct of this sort, which according to Western notions would be condemned as a breach of the marital obligation is not so condemned either by Hindus or by Muhammadans. No doubt, the right of maintenance enforceable under the Procedure Code is a right which exists independently of the personal law of the parties. The provision is analogous to that made by the English poor law under which children who have no common law right to maintenance at their father's hands, may claim it from them before a Magistrate. (See *Bazeley* v. *Forder*, L. R., 3 Q. B. 559).

The circumstance, however, that the right rests on statute and not personal law does not, I think, preclude a consideration of the usages of the particular community for the purpose of determining the meaning of the term 'adultery.' I cannot conceive that it was intended to apply the term to conduct considered by the community to which the parties belong as innocent from a matrimonial point of view. Subject to these observations on the general question, I am of opinion that the question referred must be answered in the affirmative.

Subrahmania Aiyar, *J.*—Adultery according to the Penal Code is an act of which a *man* alone can be guilty. It is an offence committed by a third person against a husband in respect of his wife. If, as was held in *Queen-Empress* v. *Mannathachari*, I. L. R., 17 M., 260, this limited meaning be adopted in construing the term adultery in S. 488 of the Criminal Procedure Code, it would follow that the husband could not properly be charged with adultery in a maintenance case, unless all the conditions of S. 497, I. P. C., are

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Sessions Judge's view were correct, it would follow that the husband could not properly be charged with adultery in a maintenance case, unless all the conditions of S. 497 of the Penal Code, including absence of consent or connivance on the part of the other husband, could be established. This is to my mind absurd. Comparing S. 497 of the Penal Code and S. 488 of the Criminal Procedure Code, I think we are entitled to say that, while in the former adultery of one species only is dealt with, in the latter adultery in the sense of a breach by either party of the matrimonial tie was intended. I would therefore decline to interfere.]

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complied with. Such, however, could not possibly have been the intention of the legislature. For, what difference does it make to the wife whom the husband has neglected or refused to maintain, whether the woman with whom he is living in adultery is a married woman or not, and, if the woman be married, whether the woman's husband connives at the adultery or not? So far as the wife is concerned, her grievance is all the same. Therefore, while in S. 497, Indian Penal Code, adultery of one specific description only is dealt with, it is clear that in S. 488 of the Criminal Procedure Code adultery is used in the wider and ordinary sense of voluntary sexual connection between either of the parties to the marriage and some one, married or single, of the opposite sex other than the offender's own spouse. This construction is not inconsistent with any part of the interpretation clause, S. 4 of the Criminal Procedure Code referred to in *Queen-Empress* v. *Mannathachari*. For, though the concluding paragraph of that section says that all words and expressions used in the Criminal Procedure Code and defined in the Indian Penal Code, but not defined in the previous part of section 4, should be deemed to have the meanings respectively attributed to them by the Penal Code, yet this provision must, in reason, be held to be governed by the qualification laid down in the opening sentence of the section, viz., "Unless a different intention appears from the subject or context." Now looking to the context, a different intention cannot but be inferred, considering that the offence of adultery under S. 497 of the Indian Penal Code, as already observed, is one against the husband, whereas under S. 488 of the Criminal Procedure Code, the term includes cases where the wrong done is to the wife. And notwithstanding that the concluding paragraph of S. 4 is separated by a full stop from that part of the section which contains the qualifying words "Unless, &c., &c.," it is difficult to believe that the framers of the section intended that that paragraph was not to be taken subject to the qualification specified in the beginning of the section. To the extent stated above, therefore, the conclusion arrived at in *Queen-Empress* v. *Mannathachari* cannot be supported. But it should not be understood that the ruling in Criminal Revision Case No. 57 of 1884 referred and relied on by *Muthusami Aiyar*, J., in that case is dissented from. In determining, in cases like the present, whether the cause shown by the wife for refusing to live with her

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husband is good and reasonable, it is but just that the Magistrate should take into consideration the social habits of the particular community to which the parties belong. If that community (as is the case with Hindus) does not completely disapprove of concubinage and tolerates it so far as to give kept women some status and rights (I. L. R., 12 B., 26), the fact that the husband keeps a concubine ought not by itself entitle the wife to claim separate maintenance. The question in each case will be whether the conduct of the husband is such as the wife consistently with self-respect and due regard to her position as wife can live in the house of the husband. If this is possible and the husband is willing to receive her, the Magistrate may refuse to order separate maintenance. I concur, therefore, in answering the question in the affirmative.

Benson, J.:—I have no doubt but that the question proposed must be answered in the affirmative. The concluding words, no doubt, of S. 4 of Criminal Procedure Code enact that any word used but not defined in that Code shall be deemed to have the meaning attributed to it in the Indian Penal Code, but this provision is subject to the opening words of section 4 which say, "Unless a different intention appears from the subject and context". This limitation seems to have been overlooked by the learned Judges who decided the case of "*Queen-Empress* v. *Mannathachari*" (I. L. R., 17 266).

In the present case "the subject and context" show that "adultery" in S. 488, Criminal Procedure Code, has a much wider significance than adultery as defined in Section 497, I. P. C. In the Indian Penal Code it is an offence committed by a man against another man in respect of the wife of the latter. It is an offence which cannot be committed by a woman; but the Criminal Procedure Code expressly contemplates adultery by a woman. For this reason, if for no other, it is impossible to say that "adultery" in S. 488, Criminal Procedure Code, has the limited meaning attributed to it in S. 497, Indian Penal Code. Again, "adultery" under the Indian Penal Code is not committed by a man who has sexual intercourse with an unmarried woman or with a widow, or with a married woman whose husband consents to it, but such considerations cannot, in reason, be held to make any difference in the "adultery" contemplated by the Criminal

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Procedure Code. The "adultery" there contemplated is, I think, adultery in the popular sense of the term, viz., a breach of the matrimonial tie by either party.

I would not, however, be understood to imply that a Magistrate ought, as a matter of course, to decree maintenance for a wife who refuses to live with her husband, solely because he has been guilty of an isolated act or acts of adultery, or even because he keeps a concubine. The words "living in adultery" imply a course of action more or less continuous. Moreover, a discretion is vested in the Magistrate. He "may," not "he shall," make an order, &c. He has, then, a discretion to consider, and be guided by the social ideas and feelings of the community to which the parties belong. Concubinage is, within certain limits, recognized both by Hindu and Muhammadan law, and is not in all circumstances reprobated by the public opinion of those communities. It follows that the keeping of a concubine is not necessarily, and in all circumstances, to be regarded by the Magistrate as a sufficient reason for a woman refusing to live with her husband, though it is equally clear that a Magistrate may in certain circumstances regard it as a sufficient reason to award separate maintenance to the wife. The Magistrate must be guided by all the facts and circumstances of each case and with due regard to the social ideas and customs of the community to which the parties belong. With these remarks, I would answer the reference in the affirmative.

[These cases coming on for final hearing before a Division Bench (consisting of the *Chief Justice* and *Mr. Justice Shephard*), their Lordships in accordance with the opinions expressed by the Full Bench, declined to interfere with the orders of the Magistrates*].

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* 14th October 1897.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Davies and Mr. Justice Boddam.

Kamalattanni and another ... Appellants * (*Plaintiffs*).

v.

Renga Aiyangar and another ... Respondents (*Defendants*).

Kamalattanni v. Renga Aiyangar.

Civil Procedure Code, S. 335—Indian Limitation Act, sch. II, art. 11—Order rejecting application after enquiry.

Where on an application under S. 335, Civil Procedure Code, by an auction-purchaser to direct the removal of obstruction by a third party, to his taking delivery of the property purchased, a court after considering the documentary evidence produced before it and hearing the arguments of both sides rejects the petition and refers the petitioner to a regular suit, on the ground that the matter was one which ought properly to be tried in a regular suit.

Held:—That the order was properly passed under S. 335, Civil Procedure Code, and was therefore governed by Art 11 of sch. II of the Limitation Act.

Second appeal against the decree of the District Court of Tanjore in A. S. No. 50 of 1896, confirming the decree of the District Munsif of Valangiman in O. S. No. 220 of 1894.

This was a suit for the recovery of a house from the defendants: The plaint house originally belonged to the defendants in O. S. No. 32 of 1882 on the file of the Sub Court of Kumbakonam, against whom the plaintiffs obtained a decree for money, and in execution of that decree purchased it in court-auction. When the plaintiffs went to take possession of the house they were obstructed by the defendants who claimed to have purchased the same house in execution of another decree against the owners. The plaintiffs then put in an application under S. 335, Civil Procedure Code, to remove the obstruction, and the Court, however, dismissed the application, as after a perusal of the documentary evidence produced before it and hearing the arguments of both sides, it was of opinion that the matter ought not to be tried summarily, but ought to be tried in a regular suit. The order was passed in 1892, and the present suit was brought in 1894. The Munsif dismissed the suit, and on appeal, the District Judge confirmed the decree of the Munsif. The plaintiffs then preferred this second appeal.

V. Krishnaswami Aiyar for appellants.

P. Subbaiya Mudaliar for 1st appellant.

C. Sankara Nair for respondents.

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* S. A. No. 237 of 1897. 17th September 1897.

Kamalattanni v Renga Aiyangar.

The Court delivered the following

JUDGMENT :—The application was made under S. 335 of the Code of Civil Procedure to direct the removal of the obstruction caused by the counter-petitioner and to put petitioner in possession. That section contemplates that on the complaint the Court shall enquire into the matter and pass such order as it thinks fit.

In the case before us, the Sub Judge considered the documents produced and heard the arguments on both sides and then came to the conclusion that the case was one that should be determined summarily. He then made an order rejecting the petition for possession and referring the petitioners to a regular suit.

It appears to us that the only enquiry necessary to be made under S. 335 is with reference to the question whether a summary order for possession should be made. The Sub Judge has made enquiry and come to the conclusion that this was not such a case. We agree with the Courts below that the enquiry in this case was sufficient, and there can be no doubt that the order passed was one passed against the petitioners, for it rejected their application.

It, therefore, fell within article 11 of the 2nd schedule of the Limitation Act, and the suit was admittedly under that article.

We dismiss the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Arthur Collins, *Kt.*, Chief Justice, and Mr. Justice Benson.

Motha ... ... Petitioner* (*Counter-petitioner in criminal-petition No. 23 of* 1896 on the file of the Sub-Magistrate of Tuticorin and appellant in criminal appeal No. 45 of 1897 on the file of the Joint Magistrate of Tinnevelly.)

v.

Moral Motha ... ... Respondent (*Petitioner* in the said criminal-petition No. 23 of 1896.)

Motha v. Moral Motha

Sanction to prosecute—Jurisdiction to give sanction—S. 195, Criminal Procedure Code (Act X of 1882)—Enquiry by court prior to giving sanction.

On an application for sanction to prosecute, under S. 195 of the Criminal Procedure Code, it is competent to the court to which the application is made, to go

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* Cr. R. Case No. 169 of 1897. 16th September 1897.
Cr. R. P. No. 100 of 1897.

Motha v. Oral Motha.

beyond the record, to hold an enquiry and take fresh evidence for the purpose of determining whether or not sanction should be granted, even though the record itself discloses no foundation for the charges alleged.

Zamindar of Sivagiri v. *The Queen*, I. L. R., 6 M., 29, dissented from.

Shashi Kumar Dey v. *Shashi Kumar Dey*, I. L. R., 19 C., 345, followed.

Petition under Ss. 435 and 439 of the Criminal Procedure Code praying the High Court to revise the judgment of the Joint Magistrate of Tinnevelly in criminal appeal No. 45 of 1897, confirming the order of the Sub-Magistrate of Tuticorin in criminal petition No. 230 of 1896 sanctioning the prosecution of the petitioner for making false statements in calendar case No. 399 of 1896 on his file.

The facts of the case appear sufficiently from the judgment of the Court.

T. Rangachariar for petitioner.

John Adam for *R. F. Grant* for the respondents.

The Public Prosecutor (E. B. Powell) for the Crown.

The Court delivered the following

JUDGMENT:—In this case one Motha was said to have committed an offence punishable under S. 193, Indian Penal Code, in a case before a Magistrate, and the Magistrate in giving sanction under S. 195, Criminal Procedure Code, for his prosecution, held an enquiry and recorded other evidence beside that in the case before him to show that there was *primâ facie* ground for the prosecution. It is contended for the petitioner before us that the original case before the Magistrate disclosed no foundation for the charge under S. 193, Indian Penal Code, and that, therefore, the Magistrate had no power to make any enquiry or grant the sanction. In support of this argument reliance is placed on *Zamindar of Sivagiri* v. *The Queen*, I. L. R., 6 M., 29, and *Abdul Khadar* v. *Meera Saheb*, 15 M., 224. We are unable to accede to the petitioner's contention. The decision in I. L. R., 6 M., 29, was based on the language of S. 468 of the Criminal Procedure Code then in force (Act X of 1872), and on certain remarks of *Garth*, C. J., in a case reported in *In the Matter of the Petition of Kasi Chunder Mozumdar*, I. L. R., 6 C., 440, under the same Code. In neither of these cases did the learned Judges refer to the effect of S. 471 of the then Criminal Procedure Code, though the section appears to

have been mentioned in the course of the argument in the Madras Case. We find it difficult to reconcile the decisions with the provisions of that section; but since those cases were decided, the provisions of the Code of Criminal Procedure upon the point under consideration have been altered and enlarged. S. 468 of Act X of 1872 provided that "a complaint of an offence against public justice "described in certain sections of the Indian Penal Code "*when such offence is committed before or against* a civil or criminal court, shall not be entertained in the criminal courts, except with the sanction of the court before or against which the offence was committed, or of some other court to which such court is subordinate." Section 195 of Act X of 1882 provides that "no court shall take cognizance of any offence punishable under" the same sections "*when such offence is committed in or in relation to any proceeding in any court,* except with the previous sanction or on the complaint of such court, or of some other court to which such court is subordinate." Then section 476 of Act X of 1882 provides that "when any civil, criminal or revenue court is of opinion that there is ground for enquiring into any offence referred to in S. 195, and committed before it or brought under its notice in the course of a judicial proceeding, such court after making any preliminary inquiry that may be necessary, may send the case for inquiry or trial to the nearest Magistrate of the first class, and may send the accused in custody, or take sufficient security for his appearance before such Magistrate, and may bind over any person to appear and give evidence on such enquiry or trial." The powers conferred by this section are much more extensive than those conferred by S. 471 of Act X of 1872, and we have no doubt but that it is now open to a Magistrate, when a person is accused of having committed before him an offence punishable under S. 193 of the Indian Penal Code, to enquire into the truth of the accusation, and, then, if it seems proper in the interests of public justice to give sanction for the prosecution, even though the original record did not, on its face, disclose that the offence had been committed.

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The words of the sections contain no limitation to an offence appearing on the face of the record, though nothing would have been easier than to have expressed such limitation if it was intended to have effect. To admit the petitioner's contention would be by

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an artificial rule to screen from prosecution men who might have committed the grossest of offences against public justice and offences perfectly capable of being proved, merely because owing to surprise, accident, oversight, or unavoidable circumstances, evidence of the offence was not, or could not be, produced before the court at the same time that the offence was committed.

It is, however, argued for the petitioner that the decision in I. L. R., 6 M., 29, was followed in *Ib.* 15 M., 225. The former case is, no doubt, referred to in the latter but without any reference to the fact that in the interval the law had been materially altered, nor was it necessary for the decision of the 15 Madras case to follow the decision in 6 Madras.

The report in the 15 Madras Case is very brief and imperfect, but there the sanction was revoked, because the document "had not been given in evidence" in the case, and, therefore, no offence under Ss. 403 and 471, Indian Penal Code, had been committed.

The approval of the 6 Madras Case (if it was approved) was a mere *obiter dictum.* It was not necessary for the decision of the case then before the Court, nor was it, in fact, the ground of that decision, and no reference was made to the change in the law made by Act X of 1882.

We must, therefore, hold that that decision does not support the petitioner's contention.

In the recent case of *Shashi Kumar Dey* v. *Shashi Kumar Dey* (I. L. R., 19 C., 345), the view we have taken was expressly maintained with reference to the language of the present Criminal Procedure Code.

We dismiss the petition.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Subrahmania Aiyar and Mr. Justice Benson.

Perianna Goundan ... ... Appellant * (*Plaintiff*).

v.

Muthu Veera Goundan and another ... Respondents.

Perianna Goundan *v.* Muthu Veera Goundan.

Hypothecation bond payable on demand—" On demand," meaning of—Limitation Act, Sch. ii, Art. 132, 147.

A hypothecation bond executed in the year 1876 after stating the security and the amount of the loan, contained the following provision " I shall pay the said principal with interest at 10 per cent. per mensem *on demand* by the holder. A suit was brought to realize the money due under this bond in 1893.

Held: That the mortgage money due under the bond became payable immediately on its execution and that no demand was necessary and that the suit was barred as the period of limitation allowed by law for a hypothecation bond executed prior to the Transfer of Property Act, was 12 years under Art. 132, Sch. ii of the Limitation Act.

Second appeal against the decree of the District Court of Trichinopoly in A. S. No. 4 of 1895, confirming the decree of the District Munsif of Kulitalai in O. S. No. 518 of 1893.

This was a suit to recover Rs. 92, principal and interest due under a hypothecation bond executed to the plaintiff's paternal uncle by the 1st defendant for 80 Rs. on the 15th of August 1876. The bond ran as follows: " Hypothecation bond, dated 15th August 1876. . . . I have hypothecated to you the punja land . . . . and borrowed from you on this date, Rs. 80. As I have received this Rs. 80 in cash, I shall pay the said principal with interest at 10 per cent. per month *on demand* by the holder. In default of so paying the amount, I and those who are entitled to my assets and liable to pay my debts, shall be liable to pay the amount with court costs." The bond in question fell to the plaintiff's share in a partition with his uncle, and the suit was instituted in 1893. The defendant contended that the suit was barred by limitation. The Courts below held that the cause of action for the plaintiff arose in 1876 and that the suit was barred by limitation under Art. 132, Sch. ii of the Limitation Act. The plaintiff then preferred this second appeal.

* S. A. No. 1525 of 1896. 23rd August 1897.

Perianna Goundan v. Muthu Veera Goundan.

P. R. Sundara Aiyar for appellants.

K. Krishnamachariar for respondents.

The Court delivered the following

JUDGMENT:—There can be no doubt but that under the general law money payable on demand is due from the date of the loan; in other words there is a cause of action on the date of the loan.

This being so, we must hold that in a suit brought to enforce payment of money so lent, the money must be taken to have become due, within the meaning of the col. 3 of Art. 132 of Schedule II of the Limitation Act, on the date of the loan. To hold otherwise would lead to an anomaly for which there is no justification. If it was intended that money lent on the security of immoveable property though payable on demand should not be subject to the general rule as to money lent and payable on demand (Art. 59), the language of the 3rd col. of Art. 132 would have been so framed as to make this clear.

We cannot, therefore, accept the appellant's contention that in a case like the present an actual demand is necessary in order to establish a starting point for limitation under Art. 132.

According to the decisions of this Court, Art. 132, and not 147, is applicable to the present case, the instrument being admittedly one executed prior to the Transfer of Property Act. Whether it might be different if the instrument had been executed after the Transfer of Property Act came into force, we need not now decide. The appellants' suit was, therefore, barred and was rightly dismissed.

We dismiss this second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur Collins, *Kt.*, Chief Justice, and Mr. Justice Benson.

Rayiran Chathan and another. Appellants* (*Defendants* 1 *and* 2.)

v.

Thottinkara Moopil ... Respondent (*Plaintiff.*)

Rayiran Chathan *v.* Thottinkara Moopil.

Malabar Law—Stanom—Stani, powers of—Waste by stani.

The stani of a Malabar stanom is not a mere tenant for life and is not impeachable for *waste* in the sense in which that word is used in English law. He represents for the time being the entire estate attached to the stanom and is not liable to be sued by the next reversioner to the office for any acts of his which do not injure the inheritance.

Second appeal against the decree of the District Judge of South Malabar in A. S. No. 621 of 1895 reversing the decree of the District Munsif of Nedunganad in O. S. No. 287 of 1894.

The facts of the case appear sufficiently from the judgment of the Court.

K. P. Govinda Menon for appellants.

V. Ryru Nambiyar for respondents.

The Court delivered the following

JUDGMENT :—This is an appeal by the stani and his lessee against a decree obtained by the plaintiff as successor to the stanom. The effect of the decree is to restrain both the defendants absolutely from cutting the timber in certain forests and to make the defendants liable in damages to the extent of Rs. 400, a peculiar direction being made as to the manner in which the money shall be treated. In the District Munsif's Court the plaintiff's suit had been dismissed on the ground that the lease was one which the stani was competent to give. This decree is reversed by the District Judge and the decree as above mentioned is framed on the strength of certain English cases cited by the Judge in which the position of a tenant for life impeachable for waste was in question. There is, as has often been observed, great danger in applying English decisions on the law of Real Property to cases which arise in this country. To make the decision cited

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*S. A. No. 426 of 1897. 15th October 1897.

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applicable, it must be assumed that the English law of waste has been adopted by the courts of British India, that the defendant stani was a tenant for life and further that he was a tenant for life and impeachable for waste. No one of these assumptions can safely be made. The position and powers of a stani have been often discussed. He is not a mere tenant for life, and he is certainly not impeachable for waste in the sense in which that expression is used in the English books. If it were true that a stani was in that position it would follow that he could not even cut down trees which were fit to cut or in a state of decay without accounting for the proceeds which would be treated as capital. (See cases cited in notes to *Garth* v. *Cotton*, 1. Wh. and T. L. C.)

The decision of the Judge founded as it is on considerations wholly foreign to the case, cannot be regarded as satisfactory. In any view, the injunction in the terms in which it is granted could not be maintained, because it goes the length of preventing the stani from making any use whatever of the timber. As, however, the stani has died, it is unnecessary to pursue the question further except so far as it affects the other defendant. He is viewed by the District Judge as a simple wrongdoer, and if it were true that the stani was a tenant for life, impeachable for waste, this view might be correct. But the stani has in truth much larger powers than are attributed to him by the Judge. He is the person who represents the estate for the time being and enjoys much the same position as was assigned to the holder of an impartible zemindari, before the current of decisions was turned in 1881. (See *Mana Vikraman* v. *Sundaran Pattar*, I. L. R., 4 M., 148). It is certainly open to a stani to make a lease of forest land for a term of years, and the mere fact that the alienation is intended to hold good after his life-time will not invalidate it. Similarly, it is competent to a stani to cut down forest trees for his own purposes, though, by the manner and extent of his operations, he may render himself liable to an action at the suit of his probable successor. It depends upon the circumstances of the case whether an alienation made by a stani or other conduct on his part in the management of the estate is of a character to render him liable to an action. In the present case, in order to make the lessee liable in damages, it would at least have to be proved that the acts done by him would, if done by the stani immediately, have rendered him

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liable as for destruction of the inheritance. By the mere cutting of trees, that being the ordinary and indeed the only way of enjoying the estate, no injury is done of which as between the stani and his successor the latter has any right to complain. Considering that as regards the lessee's liability the finding of the Judge is vitiated by the erroneous point of view which he adopted, and taking into amount the extent of the forest and the comparatively small account of timber cut, we hold that, on the facts stated, the decree for damages against him is not justified. As it stands, the decree relating to the damages is moreover unworkable. The District Judge in adopting it from the prayer of a bill, has failed to notice that in order to make the decree complete, directions would be required as to the persons to whom the interest on the sum invested or the sum itself should ultimately be paid.

We must set aside the decree against the surviving defendant, and restore as regards him the decree of the District Munsif. The respondent must pay his costs in this and in the lower appellate Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Davies.

Subramania Aiyar ... ... Appellant* (*Defendant*)

v.

Saminatha Aiyar ... . Respondent (*Plaintiff*).

Subramania Aiyar v. Saminatha Aiyar.

Transfer of Property Act, S. 119—Covenants implied in law and express covenants.

An express covenant will do away with the effect of all implied ones. The rule is that inasmuch as covenants in law are intended to be operative only when the parties themselves have omitted to enter into any contract respecting matters to which the covenants in law relate, the latter cease to have any force the moment such a contract is entered into even though the contract expressly provides only for some of the matters covered by the covenants in law and is silent as to the rest.

The plaintiff and the defendant mutually effected exchange of certain lands on the 1st March 1891. On the 7th June 1891 the parties executed to each other certain documents styled "security bonds." The bond executed by the defendant contained the following provision:—"if any claim or dispute arises, I hereby bind myself to

* A. A. O., No. 35 of 1897. 16th November 1897.

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settle it. If I do not so get (the dispute) settled, I hereby bind myself to pay an amount not exceeding Rs. 4,014 8-6, at the rate of Rs. 1-4-0 per kuli of land for lands which go out of your possession. This security bond shall be sustainable for 12 years from this date." In a suit by the plaintiff for the recovery of lands given by him in exchange on the ground that he had been evicted from the lands transferred to him.

Held: that the option to re-enter given to the plaintiff under S. 119 of the Transfer of Property Act was taken away by the terms above referred to and the plaintiff cannot recover.

Appeal against the remand order of the Subordinate Judge's Court of Negapatam, dated 21st September 1896, passed in A. S. No. 219 of 1896, presented against the decree of the Court of the District Munsif of Mayavaram in O. S. No. 191 of 1895.

The facts of the case appear sufficiently from the judgment of the court.

V. Krishnaswami Aiyar for appellant.

P. R. Sundara Aiyar for *C. Ramachandra Rau Saheb* and *T. Ranga Ramanujachariar* for respondent.

The Court delivered the following

JUDGMENT:—On the 1st March 1891, the plaintiff and the defendant executed an instrument of exchange and mutually transferred possession of the respective lands comprised in the instrument. It contains no provision by way of covenant for title, for quiet enjoyment or for re-entry, in case either party be evicted. On the 7th June 1891, however, the parties executed to each other documents styled "security bonds". The bond executed by the defendant to the plaintiff on that date, after reciting the exchange which had taken place, runs:—"If any claim or dispute arises, I hereby bind myself to settle it. If I do not so get (the dispute) settled, I hereby bind myself to pay an amount not exceeding Rs. 4,014-8-6 at the rate of Rs. 1-4-0 per kuli of land for lands which go out of your possession. This security bond shall be sustainable for twelve years from this date." The plaintiff alleging that he was induced to enter the transaction of exchange by certain untrue representations of the defendant and that he had been evicted from the lands transferred to him, instituted the present suit praying for the recovery of the lands which he gave in exchange to the defendant. The material alle-

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gations in the plaint were traversed by the defendant and a number of issues were framed. The District Munsif, however, without trying the questions of fact as to which the parties were at issue, dismissed the suit recording a finding upon the first part of the 4th issue. That part, though not clear and definite, appears to have been understood in the lower Courts to raise the question whether the right to re-enter, which in the absence of a contract to the contrary, the plaintiff would possess under S. 119 of the Transfer of Property Act, was affected by the security bond obtained by the plaintiff from the defendant. The District Munsif held that that instrument restricted the plaintiff's remedy in case of eviction to compensation at the rate agreed and therefore the claim for the recovery of the land was unsustainable, and dismissed the suit. On appeal, the Subordinate Judge was of opinion that the instrument in question modified the plaintiff's right in so far as the amount of compensation was concerned, provided he chose to ask for compensation, but that it did not take away his right to recover the lands themselves, if he elected to claim such restoration. The Subordinate Judge set aside the District Munsif's decree and remanded the suit in order that the other points in dispute may be tried.

The question for determination now is, whether the construction put by the Subordinate Judge on the security bond is right. In supporting that construction, the learned vakil for the plaintiff strenuously argued that, on eviction, the plaintiff's right to re-enter on the lands given by him in exchange must be taken to remain quite unaffected, inasmuch as it is not expressly taken away by the security bond. We cannot accede to this contention. The rule applicable in such cases was long ago stated by *Chancellor Kent* in the following few words:—"An express covenant will do away with the effect of all implied ones; 4 Co. 80, 86; Vaugh, 126; Cro. Eliz., 674-5; Butler's Notes on Co. Litt. 332; 2 Bos. and Pull, 26; 2 Ch. cases 19" (*Frost* v. *Raymond*, 2, Caines 188, 2 American Decisions at page 231)". Of those cited by the Chancellor, the language of two of the authorities might be quoted here. Referring to an implied warranty, Butler said "the insertion of any express covenant on the part of the grantor would qualify and restrain its force and operation within the import and effect of that covenant,

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as the law, when it appears by express words how far the parties designed the warranty should extend, will not carry it farther by construction." And in the case in 2 Bos. and Puller, *viz.* :— *Browning* v. *Wright, Buller*, J., observed "the words 'grant and enfeoff' amount to a general warranty in law, and have the same force and effect. The covenants, therefore, which have been introduced in more modern times, if they have any use besides that of swallowing a quantity of parchment, are intended for the protection of the party conveying; and are introduced for the purpose of qualifying the general warranty, which the old common law implied. This has been clearly settled ever since *Noke's* case" (at page 26). The same view has been often affirmed since, and among these later cases, it is sufficient to refer to *Line* v. *Stephenson* (4 Bing, N. C., 1838) and *Dennett* v. *Atherton* (L. R., 7 Q. B. at page 316). In other words the rule is that inasmuch as covenants in law are intended to be operative only when the parties themselves have omitted to enter into any contract respecting matters to which the covenants in law relate, the latter cease to have any force the moment such a contract is entered into, even though the contract expressly provides only for some of the matters covered by the covenants in law and is silent as to the rest. In such a case it is the contract alone that regulates and governs the nature of the party's obligation and the extent of his liability. The reason for this conclusion cannot be better expressed than in the language of *Lord Denman*, C. J., in *Aspdin* v. *Austin*, quoted with approval by the Judicial Committee in *Pallikela Gatha Marcar* v. *Sigg* (L. R. 7. I. A. at page 105). He points out, "where parties have entered into written engagements with expressed stipulations, it is manifestly not desirable to extend them by any implications; the presumption is that, having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument, * * and it is one thing for the court to effectuate the intention of the parties to the extent to which they may have, even imperfectly, expressed themselves, and another to add to the instrument all such covenants as, upon a full consideration, the court may deem fitting for completing the intentions of the parties, but which they, either purposely or unintentionally, have omitted. The former is but the application of a rule of construction to that which is written; the latter adds to the obligation by which the parties have bound themselves, and

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is, of course, quite unauthorized, as well as liable to great practical injustice in the application. " (5 Q. B. N. S. at p. 684). It follows therefore that even if the security bond were entirely silent with reference to the question of the right to take back the land given in exchange by the plaintiff, that right was lost when the security bond was taken. But the bond is not quite silent on the point. On the other hand, the instrument by clear inference seems altogether to deprive the plaintiff of the right to recover the land. For the undertaking given by the defendant that he shall pay at Rs. 1-4-0 per kuli for so much of the land as the plaintiff might be evicted from, distinctly suggests that the statutory covenant which would have enabled the plaintiff to recover the whole of the land given by him, even if he had been evicted from but a small portion of what he got in exchange, was not intended to be enforced. Further, the terms of the bond, read as a whole, seem to lead to the conclusion that they entirely supersede the rights given by sections 119 and 120. The provision that the bond shall be in force only for twelve years unquestionably shows that after the lapse of that period the defendant was to be under no responsibility for the consequences of any defect in his title to the land conveyed by him, and this is inconsistent with the contention that the right to recover the land, given by section 119, was left intact. Again the covenant to settle any *claim or dispute* that might arise, respecting the land transferred by the defendant is much wider than the covenants arising under Ss. 119 and 120. In short there is such substantial difference between the express covenants in this case and the covenants implied by law that it would be quite unreasonable to impute to the parties an intention that the latter should have operation to any extent. The Subordinate Judge's construction of the document cannot therefore be sustained, and the plaintiff's prayer for the restoration of the lands sued for must fail if the covenant as to it under S. 119 were the only ground on which it was based. As, however, the plaintiff has alleged in support of it other grounds also, which have not been tried, the order remanding the suit for their trial must be upheld notwithstanding our having arrived at a conclusion different from that of the Subordinate Judge as to the effect of the security bond on the plaintiff's alleged right to the possession of the lands sued for.

The costs will however abide and follow the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Shephard and Mr. Justice Davies.

Kalyanasundaram Aiyar and others. { Appellants * (*Defendants* 2, 3, 4, 6, 9, 10 and 19.)

v.

Umamba Boyi Saheb and others... { Respondents (*Plaintiff and Defendants* 15 to 18.)

Kaliyanasundaram Aiyar *v.* Umamba Boyi Saheb.

Confiscation by Government—Grant by Government after confiscation, nature of—Trustee, rights of Re-grant, nature of—Religious Endowments Act XX of 1863, S. 4.

The Maharaja of Tanjore was trustee of certain public pagodas in his dominions. After his death in 1855, the British Government took possession of all his property (public and private) by an act of state, but regranted his private property to his family on the 21st of August 1862 in terms which placed the senior Rani, the other Ranies and the Rajah's daughter in the same position as they would have occupied under Hindu Law, had no confiscation taken place. With regard to the public pagodas of which the late Rajah was trustee, the senior Rani memorialised the Government on the 13th January 1863 in the following terms: "your memorialist prays that the pagodas and charitable institutions which have been founded from time to time by members of her family may now be made over to her as the head of the family for the time being." And the Government Agent recommended her request in the following terms: "Now, however, that the memorialist, H. H. Kamakshi Boyi Sahiba, has been recognized as the head of the family, and has had the whole of the private property of the late Rajah made over to her, I conceive that the Government will be disposed to accede to her request, as far as it relates to the management of the pagodas." On these materials, the Government wrote on the 19th March 1863: "It is desirable that the connection of Government with the pagodas should cease, and they will accordingly be made over to Her Highness Kamakshi Boyi Sahiba," the senior Rani.

Held:—That the grant to Kamakshi Boyi was that of a widow's estate, and that it put her in the position which she would have enjoyed under Hindu Law had there been no confiscation on the death of the Rajah and that the British Government being competent to deal with the pagodas in such manner as they thought fit, treated them as institutions falling under S. 4 of the Religious Endowments Act XX of 1863 and made an absolute transfer of them to the family without any reservation of a reversionary right to make new appointments of trustees as opportunities may arise.

Appeal against the decree of the Court of the Subordinate Judge of Tanjore in O. S. No. 3 of 1894.

The facts of the case are sufficiently clear from the judgment of the Court.

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* A. No. 234 of 1895. 23rd September 1897.

Kaliyanasundaram Aiyar v. Umamba Boyi Saheb.

C. R. Pattabhirama Aiyar for appellant.

The Officiating Advocate-General (*V. Bhashyam Aiyangar*) and *T. Jivaji* for 1st respondent.

K. N. Aiya for 2nd respondent.

The Court delivered the following

JUDGMENTS :—*Shephard, J.*—The appellants are the members of the two Devastanam committees of Tanjore and Kumbakonam. The 1st respondent is the senior Rani of the late Maharajah of Tanjore.

The suit relates to certain Davastanams known as the Fort or Palace Devastanams, and their endowments of which the 1st respondent claims to be hereditary trustee in succession to her co-widow, H. H. Kamakshi Boyi who died in 1892. Numerous questions appear to have been raised at the trial in the Court below, but in this Court, the appellants' vakil did not argue the questions involved in the last seven issues and confined himself to the contentions hereinafter mentioned.

Whatever estate or interest, the late Kamakshi Boyi did acquire, was undoubtedly acquired by her under the order of Government, dated 19th March 1863, which concludes with the words, "It is desirable that the connection of Government with the pagodas should cease, and they will accordingly be made over to Her Highness Kamakshi Boyi Sahiba." Some attempt was made to show that the late Maharajah who died in 1855 and whose property was thereupon seized by the Government in the exercise of its sovereign power (see *The Secretary of State in Council of India* v. *Kamachee Boye Sahaba*, 7 M. I. A., p. 476) was not the trustee of these pagodas but possessed over them nothing more than the *Melkoima* or sovereign right of superintendence. This point is, in my opinion, sufficiently dealt with by the Subordinate Judge in the 17th and following paragraphs in his judgment. There is a clear distinction made in the documents exhibited between the public and the Fort temples. The latter are spoken of by Commissioner Phillips in his letter of the 15th June 1857 as "possessions of the Raj which must unavoidably remain under management by

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Government officers until the final settlement of Tanjore affairs." I think the Subordinate Judge is clearly right in holding that the late Rajah was trustee of these pagodas.

That being so, the only question is what was the intention of Government in passing the order above mentioned of the 19th March 1863. It is necessary to consider the circumstances which led up to that order. On Mr. Phillips' letter above mentioned, the Government obtained the opinion of the Advocate-General as to the course which they could legally adopt with regard to the pagodas and their revenues, and on the 21st July 1858, an order was passed which concludes with the following words:—Under these circumstances, the Governor in Council requests that the Commissioner will proceed at once to take measures for the disposal of the pagodas on the principles above indicated and for making them over to trustees, reporting the arrangements which he would propose for the sanction of Government before their being carried out. It has occurred to Government that these Devastanams might be made over wholly or in part to Sakharam Sahib, son-in-law of the late Rajah, as sole trustee, but on this point they would desire to have Mr. Phillips' opinion."

On the 21st August 1862, an order was made by the Government to the effect that the private property of the late Rajah should be handed over to the senior Rani, the late Kamakshi Boyi, on the terms mentioned therein (see order in 3 M. H. C. R., 423). The nature of these terms was such that the senior Rani and the other Ranies and the Rajah's daughter were practically placed as between themselves in the position in which they would have been under Hindu Law, had no confiscation of the property taken place. On the 13th January 1863, the Government Agent sends up to Government a memorial from the senior Rani with his report upon it. In the memorial occurs this passage:—"Finally, your memorialist prays that the pagodas and charitable institutions which have been founded from time to time by members of her family may now be made over to her as the head of the family for the time being. No objection, she submits, can arise from the circumstance of her being a female; for the Rani of Ramnad is the acknowledged head of all charities in her zemindary and has been so judicially declared by the late Court of Sadr Adalut." The memorial ends

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with the submission that the memorialist is the fit and proper person as the senior widow of her late husband, and to have the charge of the charitable endowments of the family.

In his report the Government Agent distinguishes between the pagodas and the chatrams. With regard to the former, he writes, "Now, however, that the Memorialist, H. H. Kamakshi Boyi Sahiba, has been recognized as the head of the family, and has had the whole of the private property of the late Raja made over to her, I conceive the Government will be disposed to accede to her request as far as it relates to the management of the pagodas." It is on these materials that the order of the 19th March 1863 was passed in the following language:—"It is desirable that the connection of Government with the pagoda should cease, and they will accordingly be made over to Her Highness Kamakshi Boyi Sahiba.

The extreme contention on the part of the appellant in the Court below seems to have been that the intention of Government was to constitute the senior Rani a mere manager removable at pleasure and not to vest any estate in her. That contention was not pressed upon us at the hearing of the appeal; but it was argued that if the senior Rani took any estate, it was only an estate for life and our attention was called by way of contract to the terms of the disposition of the Raja's private property expressed in the order of the 21st August 1862.

Whatever may have been the intention of Government as to the devolution of the estate on the death of Kamakshi Boyi Sahiba, I think it clear that they intended to make an absolute transfer without any reservation of a reversionary right to make a new appointment. The evidence shows that at the time, the Government was anxious to divest itself and its officers of the charge of religious endowments. Only nine days before the order of Government was passed the Act XX of 1863 received the sanction of the Governor-General. By that Act a distinction was drawn between those temples whose trustees had been appointed by Government and those which had been managed by hereditary trustees. It being competent to the Government to deal with the Fort pagodas in such manner as they thought fit, they treated the pagodas as if they belonged to the latter class dealing with them in accor-

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dance with the provisions of S. 4 of the Act. There is nothing to show that the resolution so to treat them was intended to be in any way conditional, or that it was intended to leave it an open question whether at some future time the pagodas might be dealt with in some other way.

The question still remains what was the precise nature of the estate intended to be taken by the senior Rani. It must be taken that the estate was in the nature of self-acquired property in the Rani's hands, in this sense, that her rights were derivative from Government and had no relation back to inheritance on the death of the Raja. That was the view taken with regard to the private property restored by the order of 21st August 1862 (See *Jijoyiamba Bayi Saiba* v. *Kamakshi Boyi Saiba*, 3 M. H. C. R., 444, etc.) In the order relating to the pagodas there are no express terms, such as there were in the earlier order, regulating the enjoyment and devolution of the estate. The intention of Government may, however, I think, be gathered from the terms of the memorial and the report on which the order proceeded. In the memorial the senior Rani prays that the pagodas may be handed over to her, "as the head of the family for the time being." The Government Agent supports her claim on the same grounds, saying that, as she has been recognized as the head of the family and has had the private property made over to her, he conceives the Government will be disposed to accede to her request regarding the pagodas. The Government does accede to her request, so recommended by the Agent, and I think it may be fairly inferred that the intention was that she should assume the management of the pagodas in the capacity in which she asked for it, that is to say, as the head of the family for the time being. It cannot be suggested that it was in any other capacity than that of widow of the late Raja that she was chosen as the person to whom the trust should be made over. And it must be presumed that the Government in making the grant had in view the personal law of the family to which the grantee belonged and intended to create an estate consonant to that law. (See *Mahomed Shumsool* v. *Shewukram*, L. R. 2., I. A. 7; *Kunacha Umma* v. *Kutti Mammee Hajee*, I. L. R., 16 M., 206.) This being so, the inference is, I think, irresistible that the intention was to grant a widow's estate, that is, to put Kamakshi Boyi in the position which she would have enjoyed, had there been no confiscation on the death of her husband, the Raja.

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The Advocate-General put the case in two ways. He argued that it was the intention of Government either to confer on Kamakshi Boyi, a widow's estate or to grant the trust property to her as stridhanam. In either view he contended the plaintiff would, on the death of Kamakshi Boyi without issue, be the person entitled to succeed. A consideration of the circumstances under which the grant was made, in my opinion, strongly indicates the intention of Government to adopt the former course, and that view of the grant is further supported by the presumption which exists in favor of the supposition that the estate, when regranted to a member of the original family, was intended to possess the qualities which it possessed in the hands of the former holder. For these reasons, I think the Subordinate Judge has come to a right conclusion, and I would dismiss the appeal with costs, to be paid by the appellants to the 1st respondent.

Davies, J.—I concur throughout.